LOREN SCOLARO
1920 N. Milwaukee Ave. #505, Chicago, IL 60647
(443) 285-1935 | lms844@nyu.edu

Chambers of Judge John D. Bates
via OSCAR

March 24, 2022

To whom it may concern:

My name is Loren Scolaro, and I am applying for the Rules Clerk position. After noticing the intriguing posting on OSCAR, I contacted my former professor Troy McKenzie, a member of the Standing Committee, and former Rules Clerk Kevin Crenny to learn more about the duties of the role. This is a unique opportunity, and my background as a research assistant and working in the restructuring field prepares me to face the challenges and can add great value to this clerkship.

Working in bankruptcy, I frequently referenced the Bankruptcy Rules, and I look forward to drawing upon my experiences in bankruptcy court to inform analysis of those and other Rules. Because of my law school internships in Judge Titus's chambers in the District of Maryland and at the United States Attorney's Office for the Southern District of New York, I have experience at the federal district court level as well. Additionally, during and immediately after graduating law school, I performed extensive research for two different professors, on both civil and criminal procedure. This too involved analysis of the relevant Rules.

My resume, transcript, and references are attached. I have included both an academic research memo and a legal filing, to demonstrate my ability to perform both the Standing Committee and the district court duties of the position. I am happy to provide additional information as needed, and I look forward to further discussion with you. Thank you for the time and consideration.

Sincerely,

Loren Scolaro

Enclosures

LOREN SCOLARO

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(443) 285-1935 | lms844@nyu.edu

EXPERIENCE

DLA PIPER, Chicago, IL
Restructuring Associate September 2019 – January 2022
Summer Associate May – August 2018
Represented debtors, creditors, and other interested parties in restructurings and distressed asset sales. Drafted trial and appellate briefing, motions, adversary pleadings, and loan documents. Performed substantial investigation and due diligence work. Significant experience includes:

- Drafted amicus curiae brief discussing first and fourteenth amendment issues for educator organizations supporting the plaintiff in a case before the United States Court of Appeals for the Eleventh Circuit.
- Second chaired multiple depositions, including several last-minute depositions the weekend before a contested sale hearing, representing the purchaser of the assets of a biotech startup in chapter 11 bankruptcy.
- Drafted portions of brief on secured asset disposition in energy company bankruptcy.
- Drafted pleadings and supported depositions in representation of franchisees in a major retail bankruptcy case.
- Drafted motions and replies related to claim administration in post-restructuring green energy bankruptcy case.
- Drafted stakeholder claim related to FTC C-band auction in communications-related bankruptcy case.
- Interviewed client and drafted pleadings in a Chicago Immigration Court asylum proceeding.
- Supported client interviews, reviewed client audit materials, and prepared presentation draft in internal investigation of multinational pharmaceutical client. Drafted sections of recommendation letter to client summarizing Chinese legal regime and findings related to client's Chinese operations.
- Conducted internal client risk assessment interviews, and reviewed and drafted policy, contract, and other compliance matters for large, multinational clients, including Nike, Inc. as a secondee. Consulted client on topics including conflicts of interest, risk mitigation, and policy update socialization.
- Analyzed asset disposition and other creditor inquiries, including production of documents in response to stakeholder requests, in representation of a multistate transportation company in chapter 11 bankruptcy.

PROFESSOR HELEN HERSHKOFF, New York, NY
Research Assistant May – July 2019
Researched cases and drafted case summaries and analysis for *2019–2020 Civil Procedure Supplement to Friedenthal, Miller, Sexton & Hershkoff, Civil Procedure: Cases and Materials (Twelfth Edition)*. Topics included subject-matter jurisdiction, class actions, judicial case management, and trial.

UNITED STATES ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, New York, NY
Legal Intern January – May 2019
Drafted memoranda, documents, and pleadings related to federal criminal cases on issues including international evidence collection, procedural standards, and conspiracy liability.

PROFESSOR ANTHONY C. THOMPSON, New York, NY
Research Assistant February – May 2018
Drafted memoranda analyzing caselaw and current events involving criminal discovery and *Brady v. Maryland*.

THE HON. ROGER W. TITUS, U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND, Greenbelt, MD
Judicial Intern May 2017 – July 2017
Researched and prepared drafts of bench memoranda and opinions for a federal judge on topics including jury instructions, admiralty civil procedure, whistleblower lawsuit venue, and ineffective assistance of counsel claims.

LAW OFFICES OF DOUGLAS R. STEVENS, Washington, DC
Litigation Paralegal April 2015 – August 2016
Drafted personal injury pleadings and motions. Interviewed clients and prepared interrogatory answers, requests for admissions, and other discovery, including documents for production.

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., *cum laude*, May 2019
Honors: *New York University Law Review*, Online Editor, Social Chair, Diversity Committee Member
Edmond Cahn Law Review Award, 2019 Recipient
GPA: 3.61
Note: *The Past, Present, and Future of United States-China Mutual Legal Assistance*, 94 N.Y.U. L. REV. 1688 (2019).
Activities: Women of Color Collective, Professional Development Chair
Transfer Student Committee, Academic Chair
NYU Identity Documents Project, Student Advocate
Transfer: The George Washington University Law School, top 15% of class, as of Spring 2017

NORTHWESTERN UNIVERSITY, Evanston, IL
B.A. in Political Science with a minor in English, June 2012
Honors: National Merit Scholar, 2008 – 2012
International Program Development, Tsinghua University, Beijing, China, Summer 2010
Activities: Northwestern University Synchronized Skating Team, 2008 – 2012

ADDITIONAL INFORMATION

Conversational in Mandarin. Additional experience includes federal contract recruiting and figure skating coaching.

Name: **Loren M Scolaro**
Print Date: **03/03/2022**
Student ID: **N10757000**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/22/2019
School of Law
Honors: cum laude
Major: Law

Transfer Credits

Transfer Credit from George Washington Univ/Law
Applied to Fall 2017

Course	Description	Units
LAW 6202	Contracts I	3.0
LAW 6203	Contracts II	3.0
LAW 6206	Torts	4.0
LAW 6208	Property	4.0
LAW 6210	Criminal Law	3.0
LAW 6212	Civil Procedure I	3.0
LAW 6213	Civil Procedure II	3.0
LAW 6214	Constitutional Law I	3.0
LAW 6216	Legal Research and Writing	2.0
LAW 6217	Introduction to Advocacy	2.0
	Transfer Totals:	30.0

Fall 2017

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Barry E Friedman			
Torts:Products Liability	LAW-LW 11140	3.0	A-
Instructor: Mark A Geistfeld			
Legislation and the Regulatory State	LAW-LW 11633	4.0	A
Instructor: Samuel Estreicher			
Federalist Papers Seminar	LAW-LW 11957	2.0	A
Instructor: Stephen Holmes			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	13.0	43.0

Spring 2018

School of Law
Juris Doctor
Major: Law

Law and Society in China Seminar	LAW-LW 10871	2.0	A
Instructor: Jerome A Cohen Ira Belkin			
Business Crime	LAW-LW 11144	4.0	B+
Instructor: Jennifer Hall Arlen			
Law and Society in China: Criminal Justice in American Perspective Seminar - Writing Credit	LAW-LW 11379	1.0	A
Instructor: Jerome A Cohen Ira Belkin			
Evidence	LAW-LW 11607	4.0	B+
Instructor: Daniel J Capra			
Lawyering for Transfers	LAW-LW 12627	3.0	CR
Instructor: Andrew Wade Williams			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	27.0	57.0

Fall 2018

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	B+
Instructor: Emiliano Octavio Marambio Catan			
Law Review	LAW-LW 11187	1.0	CR
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B+
Instructor: Stephen Gillers Barbara Gillers			
Marden Competition	LAW-LW 11554	1.0	CR
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Helen Hershkoff			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	40.0	70.0

Spring 2019

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Troy A McKenzie			
Asian American Jurisprudence Seminar	LAW-LW 10603	2.0	A
Instructor: Karen Shimakawa			
Prosecution Externship - Southern District Seminar	LAW-LW 10835	2.0	A-
Instructor: Margaret S Graham Anna M Skotko			
Law Review	LAW-LW 11187	1.0	CR
Prosecution Externship - Southern District	LAW-LW 11207	3.0	CR
Instructor: Margaret S Graham Anna M Skotko			
Negotiation	LAW-LW 11642	3.0	A-
Instructor: Dina R Jansenson			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	55.0	85.0

Staff Editor - Law Review 2017-2018
Online Editor - Law Review 2018-2019
Edmond Cahn Law Review Award

End of School of Law Record

GWid : G43558795
Date of Birth: 02-FEB

Date Issued: 01-AUG-2017

Record of: Loren Marie Scolaro

Page: 1

Student Level: Law
Admit Term: Fall 2016

Issued To: UNOFFICIAL TRANSCRIPT

Current College(s):Law School
Current Major(s): Law

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2016			
Law School			
Law			
LAW 6202	Contracts I Gabaldon	3.00	A
LAW 6206	Torts Schoenbaum	4.00	A-
LAW 6210	Criminal Law Fairfax	3.00	A+
LAW 6212	Civil Procedure I Peterson	3.00	B+
LAW 6216	Legal Research And Writing Snyder	2.00	A-
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.800			
CUM 15.00 GPA-Hrs 15.00 GPA 3.800			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			
Spring 2017			
Law School			
Law			
LAW 6203	Contracts II Fairfax	3.00	B+
LAW 6208	Property Schwartz	4.00	B
LAW 6213	Civil Procedure II Peterson	3.00	A-
LAW 6214	Constitutional Law I Smith	3.00	A
LAW 6217	Introduction To Advocacy Snyder	2.00	A
Ehrs 15.00 GPA-Hrs 15.00 GPA 3.533			
CUM 30.00 GPA-Hrs 30.00 GPA 3.667			
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1%-15% OF THE CLASS TO DATE			

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	30.00	30.00	110.00	3.667
OVERALL	30.00	30.00	110.00	3.667

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To: Professor Helen Hershkoff
From: Loren Scolaro
Date: July 3, 2019
Re: Research Memo for Chapters 4 (Subject-Matter Jurisdiction), 10 (Class Actions), 12 (Case Management), and 14 (Trial)

PRINCIPLES AND METHODS

This memo summarizes recent Supreme Court and lower federal court cases, as well as developments in the Federal Rules of Civil Procedure and legal academia in the following chapters: Chapters 4 (Subject-Matter Jurisdiction), 10 (Class Actions), 12 (Case Management), and 14 (Trial). Each of the four sections of this memo addresses one chapter, divided into subchapters ordered by the persuasiveness of authority: statutory, rule, Supreme Court, lower federal courts, and academia.

To find the included cases, I conducted searches on WestLaw, and I used online blogs as a guide for what professors and court watchers believed to be important. These blogs included SCOTUSBlog, https://www.scotusblog.com/, and Civil Procedure & Federal Courts Blog, https://lawprofessors.typepad.com/civpro/. I included cases from the lower federal courts when those cases addressed areas of disagreement among the circuits or applied the law in apparently novel ways.

If a case applied to more than one section, I included the summary where and to the extent that it was most relevant. For example, *Home Depot U.S.A., Inc. v. Jackson* addressed both subject-matter jurisdiction and class claims, but I placed the case summary under the earlier subject-matter jurisdiction heading with a reference under the class actions heading. I did not find much new law in judicial case management for Chapter 12, though I identified the ongoing opioid litigation as a potentially useful pedagogical tool and summarized some elements of the proceedings.

4. SUBJECT-MATTER JURISDICTION

A. Supreme Court Cases

Writing for the Court in *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019), Justice Ginsburg addressed the difference between jurisdictional rules that determine a federal court's power to hear a case and nonjurisdictional claim-processing rules, which "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 1849 (quoting Henderson v. Shinseki, 562 U.S. 428, 435 (2011)). Title VII requires the filing of a charge with the EEOC within 180 days of an unlawful employment practice. The Court held that this was a claim-processing rule, which, unlike subject-matter jurisdiction, is waived as a defense if not timely raised.

The Court denied certiorari to hear a similar issue in *Graviss v. Department of Defense*, where the Federal Circuit found that 5 U.S.C. § 7703(b)(1)(A)'s 60-day filing deadline for federal review of a Merit Systems Protection Board employment decision was a jurisdictional rule, and the plaintiff's failure to meet the deadline meant that she could no longer seek judicial review. *See* Fed. Educ. Ass'n-Stateside Region v. Dep't of Def. 898 F.3d 1222 (Fed. Cir. 2018), *cert. denied sub nom.* Graviss v. Dep't of Def., No. 18-1061, 2019 WL 588964 (May 20, 2019).

Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2019) provides a practical illustration of the effects of claim structure on subject-matter jurisdiction and ability for defendants to remove. The action began in North Carolina state court when Citibank filed a debt collection action against George W. Jackson, alleging that he had failed to repay debts incurred in the purchase of a water treatment system using a Home Depot credit card. Jackson responded with a counterclaim, joining Home Depot and Caroline Water Systems as third-party class action counterclaim defendants, alleging violations of state consumer laws. Citibank dismissed its claims against Jackson, and Home Depot filed a notice of removal in federal court under the Class Action Fairness Act (CAFA). The Fourth Circuit found that Home Depot, as a third-party counterclaim defendant, was not a defendant entitled to remove under CAFA.

Writing for the five-Justice majority at the Supreme Court, Justice Thomas found that neither § 1441 nor CAFA permits removal to federal court by a third-party counterclaim defendant. Justice Thomas pointed to the text of the removal statute, which authorized only removal for defendants of "civil actions," not "claims." The Court then concluded that authorizing removal for third-party counterclaim defendants under CAFA would create inconsistency, analogizing to the holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), which stated that a counterclaim defendant who was the original plaintiff is not a "defendant." Justice Alito filed a dissent arguing that both § 1441 and CAFA authorized removal for defendants of "claims," including third-party counterclaims, based on the underlying policy that removal should allow defendants access to a neutral forum.

B. Lower Federal Court Cases

In the National Prescription Opioid Litigation, the district court applied both the well-pleaded complaint rule and the *Grable* test to show that the defendant Walgreens lacked federal question jurisdiction to remove a case filed by the Kentucky state attorney general. *See* In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2019 WL 180246, at *2 (N.D. Ohio Jan. 14, 2019). The court found that the complaint pleaded only state law claims and noted that, although federal duties were at issue in the litigation, the presence of overlapping state law duties meant that the federal duties could not be necessarily raised.

If teaching subject-matter jurisdiction after preclusion, the First Circuit's recent decision in *Sexual Minorities Uganda v. Lively*, 899 F.3d 24 (1st Cir. 2018) illustrates the preclusive effect when a party changes their theory of subject-matter jurisdiction during the course of litigation. Pro-LGBTQ advocacy group Sexual Minorities Uganda sued Lively, an American citizen, and based subject-matter jurisdiction both on Alien Tort Statute (ATS) federal question claims and on diversity of citizenship. Initially, Lively argued that the ATS did not apply and that diversity jurisdiction did not exist. The district court agreed, granting summary judgment for Lively. Despite prevailing, Lively appealed because of dicta in the district court's opinion describing Lively's extreme homophobic conduct, revealed in discovery during the litigation. The First Circuit held that the district court's opinion that it had no subject-matter jurisdiction was not a decision on the merits and not binding. *See id.* at 31. Nevertheless, Lively was estopped from contradicting his representations to the district court and attempting to argue the existence of subject-matter jurisdiction on appeal. *Id.*

C. Law Reviews

Professor Jordan described the interactions between developments of personal jurisdiction law and removability based on diversity jurisdiction. *See* Samuel P. Jordan, *Hybrid Removal*, 104 Iowa L. Rev. 793 (2019). After *Bristol-Myers Squibb Co. v. Superior Court*, p.157, state courts have limited jurisdiction to hear claims from out-of-state plaintiffs regarding out-of-state harms. Once a defendant successfully moves to dismiss claims in state court based on a lack of personal jurisdiction over out-of-state plaintiffs, an out-of-state defendant can remove the in-state plaintiffs' claims to federal court based on diversity jurisdiction. *See id.* at 809–10. Professor Jordan identified a trend among defendants, which he labelled "hybrid removal," wherein many defendants skip the state court challenge to personal jurisdiction and instead file notice of removal immediately, despite a facial lack of complete diversity. The defendants then ask the federal court to assess personal jurisdiction as a part of the subject-matter jurisdiction analysis and grant removal if complete diversity exists after dismissing claims that lack personal jurisdiction. *See id.* at 810.

10. CLASS ACTIONS (R23)

A. Rules Amendments

Changes to Rule 23 took effect on December 1, 2018. The changes primarily related to notice, objections, and appeals. Rule 23(c)(2)(B) has been amended to clarify the requirement that notice be made not only to classes certified under Rule 23(b)(3) for further litigation but also under Rule 23(e)(1) for settlement classes under Rule 23(b)(3). The Rule now specifies that notice may be made "through United States mail, electronic means, or other appropriate means." The Committee Notes explain that the rationale for this change is to take into account modern changes in communications since the Rules' first drafting.

The revised Rule 23(e)(2) identifies factors for district courts to consider when determining, after a hearing, the fairness of a proposed class settlement. These factors include consideration of whether:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members are treated equitably relative to each other.

The amendments to Rule 23(e)(5) clarify the role of objectors in class proceedings. An objector must state the breadth of and grounds for the objection, and payments in connection with forgoing or otherwise abandoning objections or appeals are barred without court approval after a hearing. The Committee Notes explain that the primary concern motivating this rule change was to prevent objectors who may threaten to delay proceedings not out of concern for the actual

fairness of the settlement but for personal gain, seeking consideration in return for withdrawing objections or dismissing appeals. This concern for blackmail objectors echoes Judge Posner's fear of "blackmail settlements," expressed in *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

The amendments to Rule 23(f) clarify that an interlocutory appeal is available for a grant or denial of class certification but not from a notice order under Rule 23(e)(1). In cases involving the United States, United States agencies, or officers or employees of the United States sued in their official capacities, the time to file a petition for permission to appeal has been extended from the default 14 days after the order is entered to 45 days.

B. Supreme Court Cases

Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2019), can be taught during class actions as well because Jackson sued the third-party defendants for class claims under Rule 23. See *supra* for an explanation of the case.

In *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019), a unanimous decision authored by Justice Sotomayor, the Court held that Rule 23(f), which sets a 14-day deadline to seek permission to appeal an order granting or denying class certification, is a nonjurisdictional claim-processing rule, as it appears in a rule and not a statute. Nevertheless, Rule 23(f)'s time limit is not subject to equitable tolling. Justice Sotomayor explained that certain claim-processing rules without textual flexibility, when properly raised, were mandatory; the analysis depended on whether the text of the rule showed a clear intent to preclude tolling, rather than jurisdictional character. The Federal Rules of Appellate Procedure specifically carve out petitions for permission to appeal as unavailable for extension, indicating "a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." *Id.* at 715.

If teaching class approval and objectors, p.803 n.2, *Frank v. Gaos*, 139 S. Ct. 1041 (2019), presents an opportunity to discuss policy and trends in *cy pres* awards, distributions to nonprofit or charitable organizations made when distribution of settlement funds to class members is practically or economically burdensome. Though presented with the question of when a *cy pres* award that did not provide direct relief to the class could be "fair, reasonable, and adequate" per Rule 23(e), the Court declined to rule on the merits in *Frank*. The per curiam opinion instead vacated the Ninth Circuit's's opinion and remanded for further consideration on whether plaintiffs had Article III standing to bring a claim.

The class representatives in *Frank* sued Google on behalf of an enormous class of internet users, claiming privacy violations under the Stored Communications Act, 18 U.S.C. § 2701, et seq. The parties reached a settlement and agreed that it was not practicable to distribute the $5.3 settlement fund among the entire class. The trial court approved a plan that would instead divide the fund among six privacy-focused organizations chosen by class counsel and Google. A group of objectors represented by the Center for Class Action Fairness challenged the settlement, arguing that a predictably low claim rate would make it feasible to distribute the fund directly among claimants in the class. The objectors argued that direct awards to only a subset of class members, those who filed claims, was preferable to an award that only indirectly benefited class interests through privacy research and advocacy. They also asserted that, if a settlement fund was non-distributable, then Rule 23(b)(3) superiority was not satisfied. *See* In re Google Referrer Header Privacy Litig., 869 F.3d 737 (9th Cir. 2017), *vacated and remanded sub nom.* Frank v. Gaos, 139

S. Ct. 1041 (2019). Because the Court remanded for further consideration of Article III standing without considering any of the Rule 23(e) issues, it remains an open question whether a *cy pres* award is a fair, reasonable, and adequate settlement in cases with large numbers of absent class members.

If teaching *AT&T Mobility, LLC v. Concepcion*, p.383, it may be useful to discuss the circuit split on whether arbitrators or the federal courts interpret ambiguous class action waivers. The Court denied certiorari in *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322 (2019), where the Eleventh Circuit concluded that the parties intended for the arbitrator to determine waiver. The *Maizes* plaintiffs were members of a cost savings club who sought to arbitrate as a class, and Spirit argued that the arbitration agreement, which was ambiguous, did not authorize class arbitration. The Eleventh Circuit agreed with the district court's determination that the arbitrator, rather than the federal courts, should interpret the agreement. The court pointed towards the arbitration agreement's adoption of the AAA rules as evidence of the parties' intent to have the arbitrator determine the availability of class arbitration, a position consistent with that of the Fifth Circuit but contrary to that of the Third, Fourth, Sixth, and Eighth Circuits. *See id.* at 1233–34.

The Court also denied certiorari in *Taylor Farms Pacific, Inc. v. Del Carmen Pena*, 138 S. Ct. 976, (2018). This left open the question of whether evidence supporting a motion for class certification must be admissible under the Federal Rules of Evidence. The Courts of Appeals have split on this issue. In *Sali v. Corona Regional Medical Center*, 909 F.3d 996 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1651 (2019), the Ninth Circuit summarized findings of the Third, Fifth, and Seventh Circuits that evidence supporting a class certification motion should be admissible but sided with the Eighth Circuit's determination that "a district court is not limited to considering only admissible evidence in evaluating whether Rule 23's requirements are met." *Id.* at 1005.

C. Lower Federal Court Cases

The Hyundai & Kia Fuel Economy Litigation can demonstrate the requirements of Rule 23(b)(3) in a Rule 23(e) settlement context. In this case, a divided three-judge panel initially vacated and remanded the district court's settlement class certification, holding that the district court had failed to analyze variations in state law. The Ninth Circuit, sitting en banc, disagreed with the panel and affirmed the district court's order for settlement. In re Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539 (9th Cir. 2019). Judge Jacqueline H. Nguyen, writing for the majority en banc, concluded that all class members had suffered similar harms from automobile manufacturers' misrepresentations about vehicles' fuel economy, regardless of whether they had purchased the vehicles new or used, and that it had been appropriate for the district court to apply California law to the nationwide class. The Ninth Circuit found that the defendants' common course of conduct satisfied the requirements of Rule 23(b)(3) predominance, as required in the Rule 23(e) settlement context, and the majority praised the district court for its careful findings and management of a complex case.

If teaching issue classes, p.785, it may be useful to identify the circuit split among treatment at the certification stage. The Sixth Circuit recently summarized this split in *Martin v. Behr Dayton Thermal Products*, 896 F.3d 405 (2018), siding with what the panel labeled the "broad view" of Rule 23(b)(3)'s requirements as applied to a Rule 23(c)(4) issue class. Under the broad view, "courts apply the Rule 23(b)(3) predominance and superiority prongs after common issues have been identified for class treatment under Rule 23(c)(4)" rather than to the class as a whole. This

allows issues to be certified for class treatment under Rule 23(c)(4), even when a lack of predominance and superiority would make a Rule 23(b)(3) class unavailable for the whole cause of action. The "narrow view," by contrast, would deny certification of issues under Rule 23(c)(4) if Rule 23(b)(3) were not already satisfied. The Sixth Circuit found that this reading undercut the policy goals of Rule 23(c)(4) and that the broad view better served the Rule's purpose.

For those who teach *Concepcion*, Casebook p.838, the Eleventh Circuit's decision in *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675 (11th Cir. 2018), shows further developments in interpreting waivers of class arbitration, tackling the issue of when parties can be bound to individual arbitration and barred from seeking class actions based on the waiver of another. Homeowners sought certification of a class to sue a shingle manufacturer, alleging violation of state consumer protection laws, breach of express warranty, strict products liability, and negligence. The district court denied certification, holding that the contractors who had purchased shingles in packages containing mandatory, shrinkwrap arbitration agreements had accepted the agreements on behalf of the homeowners on whose homes they would install the shingles. The Eleventh Circuit affirmed, holding that the arbitration agreements were valid under contract law and that home contractors, acting as homeowners' agents, could bind the homeowners to the arbitration contract. The contractors' knowledge of the contract was imputed, even when the homeowners themselves lacked actual notice of its terms.

D. Law Reviews

Professor Wasserman identified a circuit split in how strictly courts treat class ascertainability, which she described as an analysis of "when and how the identities of individual class members must be ascertained." She explained how in district courts within circuits that apply a strict approach, class members' lack of objective proof of membership may be an insurmountable barrier to certification in certain low-cost consumer class actions where consumers are not likely to have saved receipts. Professor Wasserman identified the Advisory Committee as the institutional actor most suited to address ascertainability within the Federal Rules, and she suggested that the Committee incorporate a more lenient, traditional approach and explicitly reject the strict approach to ascertainability. Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 Conn. L. Rev. 695 (2018).

If teaching *Cooper v. Fed. Reserve Bank of Richmond*, p.834, it may be useful to note the possible difference in preclusive effect between a class action judgement and a class settlement. Attorneys Kris J. Kostolansky and Diane R. Hazel identified a circuit split in the preclusive effect of Rule 23(e) class settlements and analogized class settlements to traditional res judicata principles. They argued that, because class settlements must be entered and accepted by the court, they should be considered final judgments for claim preclusion purposes. *See* Kris J. Kostolansky & Diane R. Hazel, *Class Action Settlements: Res Judicata, Release, and the Identical Factual Predicate Doctrine*, 55 Idaho L. Rev. 263 (2019).

12. CASE MANAGEMENT (RULE 16, SCHEDULING ORDERS, TRIAL PLANS, SANCTIONS)

The opioid litigation is a developing and timely illustration of a district court judge using strong case management techniques in a complex and closely-watched case. Presiding Judge Dan Aaron Polster of the Eastern District of Ohio indicated in his intention to "do something meaningful" in response to the opioid crisis, using an aggressive, contracted litigation schedule to

force settlement if necessary. *See* Transcript of Proceedings at 4, In re Nat'l Prescription Opiate Litig., No. 17-cv-2804 (E.D. Ohio Jan. 9, 2018) ("People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unravelling complicated conspiracy theories."); *see also* Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. Times (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html. Though Judge Polster remains committed to pushing the parties towards global settlement, a bellwether trial is currently scheduled for fall of 2019. Jan Hoffman, *Opioid Lawsuits Are Headed to Trial. Here's Why the Stakes Are Getting Uglier.*, N.Y. Times (Jan. 30, 2019), https://www.nytimes.com/2019/01/30/health/opioid-lawsuits-settlement-trial.html

The immense consolidated litigation proceeded using both special masters and magistrate judges. *See, e.g.*, In re Nat'l Prescription Opiate Litig., No. 1:17-CV-02804, 2019 WL 2477416, at *23 (N.D. Ohio Apr. 1, 2019) (magistrate judge's opinion recommending a ruling on defendants' motion to dismiss); In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2019 WL 1872908, at *1 (N.D. Ohio Apr. 26, 2019) (district court's opinion modifying the Special Master's recommendation and determining sanctions for plaintiffs' failure to disclose an agreement with a witness). Other disputes in the litigation may be useful when discussing, for example, the limits of discovery. *See, e.g.*, In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2019 WL 763564, at *1 (N.D. Ohio Jan. 23, 2019) (denying Defendant McKesson's request to compel production of a statewide pharmaceutical system database "apparently without placing or attempting to place any geographic or temporal limitations on their request"). The Sixth Circuit found in June 2019 that the district court had abused its discretion in allowing for filing of certain pleadings under seal. In re Nat'l Prescription Opiate Litig., No. 18-3839, 2019 WL 2529050, at *14 (6th Cir. June 20, 2019).

14. TRIAL (JML, JURIES, INSTRUCTIONS)

A. Supreme Court Case

The Court's recent decision in *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019), combines a question of preemption with a dispute over the better-positioned judicial decisionmaker. Plaintiffs in the cased sued on the basis of state failure-to-warn law. Previous cases before the court had found such claims preempted when there was "clear evidence" that the Food and Drug Administration would not have approved a change to the drug's label. The Court clarified in *Merck Sharp & Dohme* that this was a question of law for the court and not one of fact for the jury. Writing for the majority, Justice Breyer acknowledged that determinations of the FDA's hypothetical actions could present mixed questions of law and fact and could include "subsidiary factual disputes" in service of the broader legal question. Nevertheless, he argued that the trial judge was the more appropriate decisionmaker because of the complexity of the legal issues. Judges' better understanding of administrative law and agency decisionmaking would then lead to greater uniformity among courts.

B. Lower Federal Court Cases

In addition to the Rule 23(b)(3) disputes discussed above, appellants in *Martin v. Behr Dayton Thermal Products*, 896 F.3d 405 (2018), also raised Seventh Amendment issues, arguing that individual proceedings after judgment in a Rule 23(c)(4) issue class would necessarily involve

reexamination of a jury verdict. The Sixth Circuit concluded that the issues were not presented at the time of class certification, as there was no jury verdict, and the district court would have an opportunity to structure the case to avoid future constitutional violations.

In *Bryant v. Egan*, 890 F.3d 382, 385–86 (2d Cir. 2018), the Second Circuit addressed an interlocutory appeal from the district court's order of a new trial. Interlocutory orders are generally not available from grants of new trial, and the Second Circuit ultimately determined that it lacked jurisdiction at the time. The case began when Bryant sued several police officers, alleging excessive force in violation of the Fourth Amendment. The jury returned a verdict in favor of the officers, but Bryant moved for a new trial. The court upheld the jury verdict in part but concluded that the jury verdict was against the weight of the evidence as to defendants Slezak and Egan, who had tased the plaintiff. Slezak and Egan sought an immediate appeal on the basis of qualified immunity. A denial of qualified immunity is an immediately appealable interlocutory order because erroneously proceeding with trial would undermine the purpose of immunity. If a denial of qualified immunity turned solely on issues of law, it may be appealable at the grant of a motion for a new trial. However, because the availability of qualified immunity for Slezak and Egan depended on facts disputed at trial—once again in dispute after the court granted in part plaintiff's motion for a new trial—the Second Circuit determined that it was premature for the officers to argue qualified immunity.

C. Law Reviews

When discussing waiver, p.1036, it may be useful to include discussion of scholarship suggesting that the civil jury trial should be presumed. In early 2017, Justice (then Judge) Neil Gorsuch and Judge Susan Graber made the following recommendation to the Advisory Committee:

> First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully. Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

Hon. Neil M. Gorsuch & Hon. Susan P. Graber, Suggestion 16-CV-F in Committee on Rules of Practice and Procedure (Jan. 3, 2017), http://www.uscourts.gov/sites/default/files/2017-01-standing-agenda_book_0.pdf. Richard Lorren Jolly expands on these ideas in *Toward A Civil Jury-Trial Default Rule*, 67 DePaul L. Rev. 685 (2018).

Other scholars, such as Judge Kathleen M. O'Malley of the Federal Circuit, have expressed concern over the erosion of the jury trial in the patent litigation context. *See* Hon. Kathleen M. O'Malley, *Trial by Jury: Why It Works and Why It Matters*, 68 Am. U. L. Rev. 1095 (2019); *but see* M. Neil Browne et. al., *Juries in U.S. Patent Cases: A Comparative Portrait of the Boundaries of Democracy*, 20 N.C. J. L. & Tech. 199, 200 (2018) (arguing that lay juries may not be well-equipped to decide highly technical patent cases).

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ABEINSA HOLDING INC., et al.,	Case No. 16-10790 (LSS)
Reorganized and Liquidating Debtors.[1]	(Jointly Administered)
	Hearing Date: December 9, 2020 at 11:00 a.m. EDT
	Obj. Deadline: December 2, 2020 at 4:00 p.m. EDT

ABENGOA SOLAR'S OBJECTION TO CLAIM OF LAYNE GRUENEWALD (PROOF OF CLAIM NO. 1054)

Reorganized Debtor Abengoa Solar, LLC ("Abengoa Solar"), by and through its undersigned counsel, hereby files this objection (the "Objection"),[2] under section 502(b) of title 11 of the United States Code (the "Bankruptcy Code") to Proof of Claim No. 1054 (the "Claim") filed by Layne Gruenewald (the "Claimant"). In support of this Objection, Abengoa Solar respectfully represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of

[1] The Reorganized Debtors in these chapter 11 cases, together with the last four digits of each Reorganized Debtor's federal tax identification number, are as follows: Abeinsa Holding Inc. (9489); and Abengoa Solar, LLC (6696). The Liquidating Debtors in these chapter 11 cases, together with the last four digits of each Liquidating Debtor's federal tax identification number, are as follows: Inabensa USA, LLC (2747); and Abengoa Bioenergy Holdco, Inc. (8864).

[2] Capitalized terms not defined in this Objection have the meanings given to those terms in the *Debtors' Modified First Amended Plans of Reorganization and Liquidation* [Dkt No. 990], as modified by the *Order Confirming the Debtors' Modified First Amended Plans of Reorganization and Liquidation* [Dkt No. 1042, as amended by Dkt No. 1043] (the "Plan").

Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2) and the Court may enter a final order consistent with Article III of the United States Constitution. Abengoa Solar consents to the entry of final orders on this Objection if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

2. The bases for the relief requested in this Objection is section 502(b) of the Bankruptcy Code, rules 3007 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 9006-1(c)(ii) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware.

BACKGROUND

A. These Chapter 11 Cases

3. On March 29, April 6, April 7, and June 12, 2016 (collectively, the "Petition Date"), the Debtors commenced these chapter 11 cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

4. On July 28, 2016, the Court entered the *Order Establishing Deadlines and Procedures for Filing Proofs of Claim and Approving the Form and Manner of Notice Thereof* [D.I. 443] (the "Bar Date Order") fixing September 26, 2016 at 5:00 pm (ET) as the deadline for creditors to file proofs of claim against Abengoa Solar for prepetition liabilities (the "General Bar Date"). The General Bar Date generally applied to any person, other than governmental units, holding a claim against any of the debtors, including Abengoa Solar, owing as of the Petition Date or any person with an alleged claim or expense to have allegedly arisen prior to the Petition Date.

5. Notice of the General Bar Date was provided by first-class mail upon all known parties in interest and by publication. *See* Bar Date Order ¶ 27 (requiring that notice was to be

provided "to all creditors, including (a) any creditors to whom no notice was sent and who are unknown or not reasonably ascertainable by the Debtors, (b) known creditors with addresses which are unknown to the Debtors or are no longer accurate and/or updated, and (c) potential creditors with claims against the Debtors.") Notice of the General Bar Date was published "(1) on September 2, 2016 in the national edition of *The Wall Street Journal*; and (2) on September 5, 2016 in the Europe and Asia editions of *The Wall Street Journal* . . . and (3) on September 2, 2016 in New York and National editions of *The New York Times*." *Affidavit of Publication* [D.I. 545].

6. On September 26, 2016, the Debtors filed the *Debtors' Plan of Reorganization and Liquidation* [D.I. 578] (as amended, the "Plan") and the *Debtors' Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code* [D.I. 579] (as amended, inclusive of the solicitation version at D.I. 748, the "Disclosure Statement").

7. As described in Article IV.B.1 of the Disclosure Statement, the Debtors were organized into four groups, one of which was Abengoa Solar.

8. On December 15, 2016, the Court entered the *Order Confirming Debtors' Modified First Amended Plans of Reorganization and Liquidation* (the "Confirmation Order") [D.I. 1042; *amended*, D.I. 1043]. The final Plan, attached to the Confirmation Order, became effective on March 31, 2017 (the "Effective Date").

9. As contemplated in the Plan and the Disclosure Statement, Abengoa Solar paid its administrative and priority claims in full and, after filing certain objections to claims against Abengoa Solar, paid its unsecured creditors in full. *See* Declaration of Jeffrey Bland ("Bland Decl."), at ¶ 12. The primary reason Abengoa Solar's case has remained open is that the United States Department of Energy (DOE), together with its borrowers, Arizona Solar One LLC and

Mojave Solar LLC, filed contingent claims against Abengoa Solar and other Reorganized Debtors that have not yet been resolved. *Id*. ¶ 13.

10. As of this Court's *Order Extending Current Claims Objection Bar Date Under Plan* [D.I. 2262], entered July 20, 2020, the Current Claims Objection Bar Date is November 4, 2020.[3]

11. On September 9, 2020, the Claimant filed the Claim in these chapter 11 cases, as Claim No. 1054, estimated at $500,000. A true and correct copy of the Proof of Claim form is attached as Ex. A to the Declaration of R. Craig Martin ("Martin Decl.").

12. On September 28, 2020, the Claimant filed *Creditor Layne Gruenewald's Motion for Relief from the Automatic Stay and Abstention Pursuant to 28 U.S.C. 1334(c)(1); Memorandum of Points and Authorities in Support Thereof* [D.I. 2270] (the "Stay Motion"). The Responsible Person has objected to the Stay Motion.

B. The Claim

13. Prior to the Petition Date, the Claimant was an employee of ASI Operations LLC ("ASI Ops"), then a wholly owned subsidiary of Abengoa Solar. *See* Bland Decl. ¶ 4. ASI Ops employed the blue-collar laborers who, pursuant to a services contract, operated and maintained two solar plants: a solar plant in Gila Bend, Arizona owned by Arizona Solar One LLC (known as the Solana facility); and a solar plant in Hinkley, California owned by Mojave Solar LLC (known as the Mojave facility). *Id*. ¶ 5. ASI Ops was never a debtor in these cases, and the Claimant did not have any employment rights with Abengoa Solar. *Id*. ¶ 4.

14. On August 15, 2016, the Claimant filed an unverified complaint against Abengoa Solar in the Superior Court of the State of California, County of San Bernardino, initially under

[3] On October 21, 2020, the Responsible Person and Drivetrain, LLC, as the Litigation Trustee and Liquidating Trustee, filed an *Eleventh Motion to Extend the Claims Objection Bar Date Under Plan* [D.I. 2280], seeking an extension of the claims objection bar date under the Plan to March 4, 2021.

the caption, *Gruenewald v. Abengoa Solar, Inc.* [sic], *et al.*, Case No. CIVDS1613360 (the "State Court Action"). A copy of the complaint in the State Court Action is attached to the Martin Declaration as Exhibit B. The Claimant alleged that on or about October 31, 2014, he sustained a workplace-related injury, and asserted six causes of action in the State Court Action: (1) Disability Discrimination in Violation of Fair Employment and Housing Act ("FEHA"), California Government Code § 12940(a); (2) Disability Discrimination in Violation of FEHA – Failure to Engage in the Interactive Process, California Government Code § 12940(n); (3) Failure to Accommodate a Disability in Violation of FEHA, California Government Code § 12940; (4) Wrongful Employment Termination (Gov. Code § 12940); (5) Retaliation (Gov. Code §12940(h); and (6) Intentional Infliction of Emotional Distress.

15. The Claimant served Abengoa Solar with the complaint and related documents from the State Court Action on September 22, 2016. *See* Bland Decl. ¶ 9.

16. Abengoa Solar filed a suggestion of bankruptcy in the State Court Action on October 5, 2016, providing the Claimant with notice of these chapter 11 cases and the automatic stay imposed under 11 U.S.C. § 362. *See* Martin Decl., Ex. C.

17. Abengoa Solar removed the State Court Action to the United States District Court for the Central District of California (the "California District Court") about three weeks later, where it is captioned *Gruenewald v. Abengoa Solar, Inc.* [sic], *et al.*, Case No. 5:16-cv-02235-DMG-SP (the "District Court Action").

18. On November 3, 2016, Abengoa Solar filed a suggestion of bankruptcy in the District Court Action. *See* Martin Decl., Ex. D, D.I. 13 District Court Action. The California District Court then ordered the Claimant to show cause in writing why the District Court Action

should not be stayed pending the resolution of these chapter 11 cases. *See* Martin Decl. Ex. E, D.I. 15 District Court Action.

19. In lieu of a response to the California District Court's order to show cause, the Claimant filed a *Motion for Relief from the Automatic Stay Under 11 U.S.C. § 362 Pursuant to Court's Order; Declaration of Maribel Ullrich in Support Thereof; and Proposed Order*, on November 18, 2016 (the "District Court Stay Motion"). *See* Martin Decl., Ex. F, D.I. 17 District Court Action.

20. On November 29, 2016, the California District Court entered an order denying the District Court Stay Motion and staying the District Court Action. *See* Martin Decl., Ex. G, D.I. 19 District Court Action. By that order, the California District Court denied the District Court Stay Motion, stating that the denial was "without prejudice to bringing a properly filed motion in the Bankruptcy Court." *Id*. In its order, the California District Court advised the Claimant that "if he does have grounds for lifting the stay, a motion for relief from stay must be filed in the Bankruptcy Court, where Defendant's bankruptcy action is pending." *Id*. That was four years ago during which time the Claimant never filed a claim or a motion in these cases, never contacted Abengoa Solar before trying to communicate with Abengoa Solar's counsel in the California District Court on September 9, 2020, and never contacted the Responsible Person. In essence, the Claimant wholly abandoned and let lapse his Claim in the face of a guiding order from the California District Court.

21. The California District Court further provided that, "[e]ither party may move to reopen this case within 30 days after the conclusion of the bankruptcy action *or the filing of an order lifting the stay by the Bankruptcy Court*" (emphasis added). *Id*.

22. As stated in the Disclosure Statement, in June 2014, prior to the filing of these cases, Abengoa, S.A. transferred its indirect ownership of the Solana facility and the Mojave facility to Atlantica Sustainable Infrastructure plc ("Atlantica")[4] while ASI Ops continued to provide operation and maintenance services to the Solana and Mojave facilities. *See* Disclosure Statement, D.I. 748, at pp. 19-21. In July 2019, Abengoa Solar divested and sold its entire interest in ASI Ops to a subsidiary of Atlantica and, as a result, ASI Ops was no longer an affiliate of Abengoa Solar or any of the Reorganized Debtors. *See* Bland Decl. ¶ 6–7.

RELIEF REQUESTED

23. By this Objection, Abengoa Solar objects to the Claim under section 502(b) of the Bankruptcy Code and the Bar Date Order and, for the reasons described below, requests that the Court enter an order, substantially in the form attached hereto as Exhibit A, disallowing with prejudice and expunging Claim No. 1054 from the Reorganized Debtors' claims register.

BASIS FOR RELIEF

24. The Claim is invalid both procedurally and substantively. First, the Claim is untimely because the Claimant filed a proof of claim four years after the General Bar Date without making the requisite showing of excusable neglect. Second, the Claim is not based on a valid right to payment from Abengoa Solar because the Claimant did not work for Abengoa Solar, but was, in fact, employed by ASI Ops – a non-Debtor and subsidiary of Atlantica.

A. The Claim Must Be Disallowed Because It Was Filed After the Bar Date Order.

25. Bankruptcy Rule 3003(c)(3) provides that, "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." In other words, the rule generally "imposes upon creditors the burden of asserting their claims against a debtor's

[4] Atlantica was previously known and did business as Atlantica Yield plc and, before that, as Abengoa Yield plc.

estate, and 'a creditor whose claim is not scheduled, scheduled improperly or scheduled as disputed, contingent or unliquidated must file a proof of claim with the bankruptcy court within the time fixed by that court.'" *In re SemCrude, L.P.*, 443 B.R. 472, 477 (Bankr. D. Del. 2011) (citing *ITT Com. Fin. Corp. v. Dilkes (In re Analytical Sys., Inc.)*, 933 F.2d 939, 941–42 (11th Cir. 1991)). A bar date is ""akin to a statute of limitations, and must be strictly observed."" *In re Energy Future Holdings Corp.*, 522 B.R. 520, 527 (Bankr. D. Del. 2015) (quoting *In re Victory Mem'l Hosp.*, 435 B.R. 1, 4 (Bankr. E.D.N.Y. 2010)).

26. Bankruptcy Rule 3003(c)(3) "contributes to one of the main purposes of bankruptcy law," which is "securing, within a limited time, the prompt and effectual administration and settlement of the debtor's estate." *In re Smidth Co.*, 413 B.R. 161, 165 (Bankr. D. Del. 2009) (citing *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995)). Fixing the amount of claims against a debtor allows such debtor to "intelligently evaluate the proposed plan of reorganization for plan approval or amendment purpose, and "[a]fter initiating a carefully orchestrated plan of reorganization, the untimely interjection of an unanticipated claim, particularly a relatively large one, can destroy the fragile balance struck by all the interested parties in the plan." *SemCrude*, 443 B.R. at 477 (internal citations omitted).

27. The due-process purpose of notice is to give the claimant "a meaningful opportunity to protect his or her claim." *In re Grossman's Inc.*, 607 F.3d 114, 126 (3d Cir. 2010) (citing 11 U.S.C. § 342(a)). "[W]hen a debtor provides proper notice to its creditors, due process is satisfied, and a court can bar creditors from asserting claims." *Smidth Co.*, 413 B.R. at 165. "For creditors who receive the required notice, the bar date is a 'drop-dead date' that prevents a creditor from asserting prepetition claims unless he can demonstrate excusable neglect." *In re New Century Trs. Holdings Inc.*, 450 B.R. 504, 512 (Bankr. D. Del. 2011) (citing *Berger v. Trans World Airlines,*

Inc. (In re Trans World Airlines, Inc.), 96 F.3d 687, 690 (3d Cir.1996)). The form of notice depends on the creditor's status. "If a creditor is known, the debtor must provide actual notice of the bankruptcy proceedings, whereas if the creditor is unknown, notice by publication is sufficient." *Khatib v. Sun-Times Media Grp., Inc. (In re Chi. Newspaper Liquidation Corp.)*, 490 B.R. 487, 494 (Bankr. D. Del. 2013). "Whether a particular claim has been discharged by a plan of reorganization depends on factors applicable to the particular case and is best determined by the appropriate bankruptcy court or the district court." *Grossman's Inc.*, 607 F.3d at 127.

28. In the present case, the General Bar Date was September 26, 2016. The Bar Date Order, with certain exceptions that are not applicable to the Claim, provides in relevant part that claims filed after the applicable bar date will be barred and not entitled to a distribution:

> Any person or entity that is required to file a timely Proof of Claim or Administrative Claim Form in the form and manner specified by this Order and who fails to do so on or before the applicable Bar Date associated with such claim (a) **shall be forever barred, estopped, and enjoined from asserting such claim against such Debtor** (or filing a Proof of Claim or asserting an Administrative Claim, as applicable, with respect thereto), and such Debtor and its property may upon confirmation of a chapter 11 plan be forever discharged from all such indebtedness or liability with respect to such claim, and (b**) shall not receive or be entitled to receive any payment or distribution of property from the Debtors or their successors or assigns with respect to such claim**.

Bar Date Order ¶ 24 (emphasis added).

29. The Claimant had ample notice and was aware of the filing of the Debtors' chapter 11 cases. Importantly, Abengoa Solar twice filed suggestions of bankruptcy in litigation to which the Claimant was a party, and the Claimant himself filed the District Court Stay Motion seeking relief from the automatic stay in November 2016. The California District Court specifically advised the Claimant that he could proceed before this Court. Yet, rather than taking action and proceeding in this Court, the path of which was made clear by the California District Court, for almost four years the Claimant did nothing; he did not act; he did not contact Abengoa Solar; and he did not contact the Responsible Person or his attorneys. Had the Claimant acted at the time, as

suggested by the California District Court, then the issues presented by the Stay Motion could have played into the confirmation calculus and been addressed in 2016. However, by failing to take any action for over four years, the Claimant should not be entitled to reclaim his lost right to participate in Abengoa Solar's bankruptcy estate and these cases in 2020.

30. In addition to the two, filed suggestions of bankruptcy in October and November 2016, the law provides that publication notice is deemed sufficient to constitute notice of the General Bar Date to the Claimant in this situation. To be sure, Abengoa Solar did not identify the Claimant in its schedules because the Claimant was an employee of ASI Ops. Even still, the Claimant initiated the State Court Action in advance of the General Bar Date and Abengoa Solar was served in the State Court Action also before the General Bar Date. The mere fact Abengoa Solar was aware of the Claimant's State Court Action, objected to the District Court Stay Motion, and filed two suggestions of bankruptcy does not mean Abengoa Solar had any affirmative duty to raise the specter of – or assist the Claimant with – a putative bankruptcy claim then or, in the face of the Claimant's inaction, along the way.

31. Despite the Claimant's actual knowledge of the bankruptcy cases, the Claimant did not file the Claim for four years. The Claimant had the required "meaningful opportunity" to assert his claim, and he sat on it. For this reason and the reasons above, as a threshold matter the Claim is late. Consistent with the Bar Date Order and existing law, the Claim must be presumptively disallowed.

B. The Claimant Has Not Made Any Showing of Excusable Neglect for the Late-Filed Claims, and a Late Allowance After Four Years Would Prejudice the Reorganized Debtors.

32. The Claimant has not only failed to demonstrate that his untimely claim was the result of excusable neglect, but has also failed to provide any explanation for why he, after being directed to these chapter 11 cases four years ago, declined to participate until this point. In certain,

specific, and exceptional cases, a claimant's tardiness in filing may be excused. *See In re W.R. Grace & Co.*, 563 B.R. 150, 152 (Bankr. D. Del. 2016) (citing *Chemetron Corp.*, 72 F.3d at 346) ("After [the] bar date, a claimant cannot participate in the reorganization unless they establish sufficient grounds for the failure timely to file a proof of claim."). "Bankruptcy Rule 9006(b)(1) empowers a bankruptcy court to permit a creditor to file a late claim if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect.'" *In re Nortel Networks, Inc.*, 531 B.R. 53, 65 (Bankr. D. Del. 2015) (citing *Chemetron Corp.*, 72 F.3d at 349). Whether a party's neglect is "excusable" is an equitable determination, "in which courts are to take into account all relevant circumstances surrounding a party's failure to file." *Id.* (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)); *see also W.R. Grace & Co.*, 563 B.R. at 158–59 (citing *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 320–21 (3d Cir. 2001)) ("Determination of whether neglect is 'excusable,' warranting allowance of late filing of a claim, calls upon the Court's equitable power and requires taking into account all relevant circumstances surrounding a party's omission. The Court must consider the totality of the circumstances.").

33. Courts considering a request for an enlargement of time based on excusable neglect consider four factors, as set forth by the United States Supreme Court in *Pioneer*: (1) the danger of prejudice to the debtor, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. *In re New Century TRS Holdings, Inc.*, 465 B.R. 38, 50 (Bankr. D. Del. 2012) (citing *Pioneer*, 507 U.S. at 395). "The burden of proving excusable neglect lies with the late-claimant." *Nortel Networks*, 531 B.R. at 65 (quoting *Jones v. Chemetron Corp.*, 212 F.3d 199, 205 (3d Cir. 2000)).

34. These factors resemble the equitable defense of laches, "which requires 'establish[ing] (1) an inexcusable delay in bringing the action and (2) prejudice'" and, if applied, would also bar allowance of the Claim. *In re One2One Commc'ns, LLC*, 805 F.3d 428, 449 (3d Cir. 2015) (citing *In re Mushroom Transp. Co.*, 382 F.3d 325, 337 (3d Cir. 2004)); *see also In re Energy Future Holdings Corp.*, 904 F.3d 298, 310 (3d Cir. 2018) ("Laches is an equitable doctrine, however, and the decision of whether to recognize it as a defense in a particular case is left to the discretion of the lower courts."); *In re Beaty*, 306 F.3d 914, 923–24 (9th Cir. 2002) ("[C]ourts have recognized that, while the failure to give a creditor notice of the bar date precludes the court from denying the creditor's claim for failing to file it before that date, laches may nonetheless bar such a claim if there is unreasonable, prejudicial delay.").

35. Here, the first factor of the *Pioneer* test, danger of prejudice against the debtors, weighs against allowing the Claim. In assessing this factor, bankruptcy courts consider: "(1) the size of the claim compared with the estate, (2) the impact on the administration of the case, (3) whether the plan was confirmed with knowledge of the claim's existence, (4) the disruptive effect upon the plan and (5) whether allowing the claim would open the floodgates." *W.R. Grace & Co.*, 563 B.R. at 159–60 (citing *In re O'Brien, Env't Energy Inc.*, 188 F.3d 116, 127 (3d Cir. 1999)). It is also a consideration "whether the payment of the claim would force the return of amounts already paid out under the confirmed Plan or affect the distribution to creditors." *In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 614 (Bankr. D. Del. 2006) (citing *In re Inacom Corp.*, Case No. 00-2426 (PJW), Civ. A. 04-390 (GMS), 2004 WL 2283599, *4 (D. Del. Oct. 4, 2004)). "[T]he party seeking to file a late claim . . . carries the burden of proving a lack of prejudice to the Debtor." *Id.*

36. The estate of Abengoa Solar has administered nearly all of its claims and will file any final objections to any remaining claims.[5] Indeed, Abengoa Solar's bankruptcy case remains open, for all practical purposes, only due to contingent claims filed by DOE and Atlantica's two borrower subsidiaries. *See* Bland Decl. ¶¶ 12–14. Abengoa Solar has otherwise complied with its Plan in all material respects and has continued to use the funds that were otherwise available to fund payments on claims and to operate its business. *Id*. ¶ 15. These funds were not unlimited, but carefully budgeted against the known claims at the time of the Plan's confirmation. It is reasonably foreseeable that Abengoa Solar would be prejudiced by an unexpected and precipitous need to reserve cash from remaining funds, if any. *Id.*

37. The Claimant has asserted in his Stay Motion that the estate will not be prejudiced because he is seeking payment merely and only from Abengoa Solar's insurance, but he has failed to explain the mechanism for relief. The Stay Motion is further confusing on those points: it states that the Claimant does not seek to have the stay lifted to enforce a judgment against Abengoa Solar, but only to prosecute his claim in the California District Court. And, he also suggests that he only intends to seek recovery from applicable insurance and, in so doing, waives his "deficiency" claim against the estate. *Compare* Stay Motion at 5, *with id*. at 7. However, the Claimant's request to proceed and then waive any deficiency claim against Abengoa Solar is an acknowledgement that the Claim should be disallowed, if for no other reason, because the Claimant is not seeking a distribution from the estate of Abengoa Solar on account of the Claim.

[5] There is one remaining claim against Abengoa Solar filed by GE Betz that Abengoa Solar has requested that GE Betz withdraw because the claim is against a non-Debtor. If that request is not honored, then Abengoa Solar intends to object to that claim soon.

38. The Claimant therefore has not met his burden of showing lack of prejudice to the estate by allowing the Claim. For these reasons, Abengoa Solar and the other Reorganized Debtors would suffer prejudice from excusing the late filing of the Claim.

39. The second *Pioneer* factor to consider is the length of the delay in filing the Claim. While there is no bright-line rule determining an acceptable length of delay, a delay of one year can be considered substantial, and a delay of even two days after a debtor has filed a plan of reorganization can be found disruptive. *See, e.g., In re Am. Classic Voyages Co.*, 405 F.3d 127, 133 (3d Cir. 2005) ("Hefta moved for relief from the automatic stay two days *after* Debtors filed their Joint Plan of Liquidation with the Bankruptcy Court. A policy that would allow proof of claims at that late date would have disrupted Debtors' reorganization."); *Cable & Wireless USA*, 338 B.R. at 616 ("The VEC's delay is substantial, as the request to file a late proof of claim comes over one year after the original governmental claims bar date, and over two years after the due date for the overdue taxes."). A delay of even a few months "takes on added significance when a plan of reorganization was confirmed in the interim." *In re Goody's Family Clothing Inc.*, 443 B.R. 5, 16 (Bankr. D. Del. 2010).

40. Here, the Claimant filed the Claim four years after the original General Bar Date had passed, despite having been advised of the need to proceed in these chapter 11 cases in November 2016. Abengoa Solar has not only already filed and confirmed its Plan, but the Effective Date has long since passed (March 31, 2017), and Abengoa Solar has effectively already implemented its Plan and is on the cusp of bringing this case to closure. Bland Decl. ¶¶ 11, 16. The one-time set of distributions to other Abengoa Solar creditors have already occurred long ago and there are no further distributions to be made on allowed claims. *Id.* ¶ 16. Abengoa Solar is at

the tail-end of its reorganization process so any further delay would be significant. Therefore, this factor weighs heavily against a finding of excusable neglect.

41. The Claimant has also failed to meet the third and most important *Pioneer* factor, or the reason for delay, including whether the delay was within the reasonable control of the movant, since he has not provided any explanation for the four-year delay by filing a motion for leave to file the Claim late as is contemplated by the Bankruptcy Code and Bankruptcy Rules. "[E]ach of the four *Pioneer* factors do not carry equal weight and that the excuse for a late filing is most important." *In re Nortel Networks Inc.*, 573 B.R. 522, 527 (Bankr. D. Del. 2017) (citing *Midland Cogeneration Venture Ltd. P'ship v. Enron Corp. (In re Enron Corp.)*, 419 F. 3d 115, 123 (2d Cir. 2005)).

42. In the Stay Motion, the Claimant does not identify any reason why he declined to participate in these chapter 11 cases, but merely complains that "the long time he has waited for the Chapter 11 procedure to be completed has caused him to feel frustrated." Stay Motion at 6:11–12. Though the Claimant filed the District Court Stay Motion after the Bar Date, the impact of a late claim filed before the proper court in November 2016 would be drastically different from the one now before this Court presently. The California District Court, in its order staying the District Court Action, made it clear to the Claimant that he was free to proceed before this Court, including by timely seeking an order for relief from the stay. The Claimant declined to do so for four years, without explanation, and provides no explanation now that would justify allowance of the late-filed Claim. The decision to file a claim "was within the reasonable control of the movant," and, indeed, the Claimant has offered no excuse for his failure to do so. *Pioneer*, 507 U.S. at 395.

43. Even assuming the Claimant's good faith, the other three *Pioneer* factors indicate the Claimant's neglect in filing the Claim after the General Bar Date is not excusable. When the

other three factors weigh heavily against a claimant, a full analysis of good faith is unnecessary. *See Am. Classic Voyages*, 405 F.3d at 134 (finding that good faith cannot "overcome the weight of the previous three factors"); *Nortel Networks*, 531 B.R. at 67 (rejecting a claimant's excusable neglect argument without deciding the claimant's good faith); *New Century*, 465 B.R. at 53 (same).

44. Notwithstanding the application of the *Pioneer* test, which strongly militates in favor of disallowance of the Claim, the equitable doctrine of laches also applies and bars the Claim. Regardless of the Claimant's notice status, it is clear from the reasons stated above, in the *Pioneer* context, that allowance of the claim is both inexcusable and prejudicial to Abengoa Solar. It is thus within this Court's sound discretion to bar the Claim for equitable reasons.

45. Because the weight of the four *Pioneer* factors, taken together, is heavily against the Claimant, Abengoa Solar respectfully requests that this Court find that the Claimant's failure to file the Claim timely was not the result of excusable neglect.

C. The Claim Must Be Disallowed Because It Has Been Asserted Against the Wrong Defendant.

46. Under section 101(5) of the Bankruptcy Code, a creditor must have a "right to payment" against the debtor in order to have a "claim." 11 U.S.C. § 101(5). Section 502(b)(1) of the Bankruptcy Code provides that a claim asserted in a proof of claim shall be allowed, except to the extent "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law." 11 U.S.C. § 502(b)(1). Section 502(b)(1) "is most naturally understood to provide that, with limited exceptions, any defense to a claim that is available outside of the bankruptcy context is also available in bankruptcy." *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450-51 (2007); *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20 (2000) ("Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions

of the Bankruptcy Code."). Therefore, a claim against the bankruptcy estate "will not be allowed in a bankruptcy proceeding if the same claim would not be enforceable against the debtor outside of bankruptcy." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 245 (3d Cir. 2004).

47. In order for its claim to be afforded *prima facie* validity, a claimant must allege sufficient facts that, if true, would support a finding that the debtor is legally liable to the claimant, and a party wishing to dispute such claim must produce evidence in sufficient force to negate the claim's *prima facie* validity. *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992). "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." *Id.* at 174 (citing *In re WHET, Inc.*, 33 B.R. 424, 437 (Bankr. D. Mass. 1983)).

48. In this case, the Claimant was not an employee of Abengoa Solar, but rather an employee of its then-subsidiary ASI Ops. ASI Ops was never a Debtor in these chapter 11 cases and thus was never party to the automatic stay which means there was no requirement that the Claimant file a claim in these cases. *See* Bland Decl. ¶¶ 4-8. Further, ASI Ops is no longer an affiliate of Abengoa Solar. Abengoa Solar does not seek an adjudication of the Claimant's litigation against other parties; Abengoa Solar merely seeks an order disallowing the Claimant's Claim because Abengoa Solar is not liable on account of that Claim. Because Abengoa Solar is not the proper defendant to the District Court Action, the Claimant does not have a right to recover from Abengoa Solar outside of bankruptcy.

49. Because a claim is not enforceable outside of bankruptcy when asserted against a mistaken defendant, the Claim, therefore, should not be allowed.

RESERVATION OF RIGHTS

50. By filing this Objection, Abengoa Solar does not waive, and hereby expressly preserves, its right to supplement or amend this Objection, or to file further objections, to assert

other grounds for objecting to the Claim. Further, Abengoa Solar does not waive the right to file objections to other claims on any grounds, including claims filed by Gruenewald or any other claimant.

CONCLUSION

51. Accordingly, for the reasons set forth above, Abengoa Solar respectfully requests that this Court enter an order, substantially in the form attached hereto as Exhibit A, (i) disallowing and expunging Claim No. 1054 from the Reorganized Debtors' claim registers; and (ii) granting any other relief the Court deems appropriate.

COMPLIANCE WITH BANKRUPTCY RULE 3007

52. To the best of Abengoa Solar's knowledge and belief, this Objection and related exhibits comply with Bankruptcy Rule 3007. To the extent this Objection does not comply in all respects with the requirements of Bankruptcy Rule 3007, the Reorganized Debtors submit that any deviations are not material and respectfully request that those requirements from which the Objection deviates be waived.

NOTICE

53. Abengoa Solar shall provide notice of this Objection, along with a notice of hearing, to: (i) counsel to the Claimant; (ii) the Office of the United States Trustee for the District of Delaware; and (iii) those parties requesting notice in these chapter 11 cases under Bankruptcy Rule 2002. In light of the nature of the relief requested, Abengoa Solar submits that no other or further notice need be given.

[Remainder of page intentionally left blank]

Dated: October 28, 2020
Wilmington, Delaware

DLA PIPER LLP (US)

/s/ R. Craig Martin

R. Craig Martin (DE 5032)
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Telephone: (302) 468-5700
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- and -

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Counsel for Jeffrey Bland as Responsible Person for the Reorganized Debtors

EXHIBIT A

(Proposed Order)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
ABEINSA HOLDING INC., et al.,	Case No. 16-10790 (LSS)
Reorganized and Liquidating Debtors.[1]	(Jointly Administered)
	Related D.I. ___

ORDER GRANTING ABENGOA SOLAR'S OBJECTION TO CLAIM OF LAYNE GRUENEWALD (PROOF OF CLAIM NO. 1054)

Upon the objection (the "Objection")[2] of Reorganized Debtor Abengoa Solar, LLC ("Abengoa Solar"), by and through its undersigned counsel, and Abengoa Solar's request for entry of an order (this "Order") disallowing and expunging the claim of creditor Layne Gruenewald (the "Claimant"), Claim No. 1054 on the Reorganized Debtors' claim registers (the "Claim"); the Court having reviewed the Objection and responses or objections to the Objection, if any; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Objection in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having

[1] The Reorganized Debtors in these chapter 11 cases, together with the last four digits of each Reorganized Debtor's federal tax identification number, are as follows: Abeinsa Holding Inc. (9489); and Abengoa Solar, LLC (6696). The Liquidating Debtors in these chapter 11 cases, together with the last four digits of each Liquidating Debtor's federal tax identification number, are as follows: Inabensa USA, LLC (2747); and Abengoa Bioenergy Holdco, Inc. (8864).

[2] Capitalized terms not defined in this Order have the meanings given to those terms in the Objection.

found that the relief requested in the Objection is in the best interests of the Reorganized Debtors' estates, their creditors, and other parties in interest; and this Court having found that Abengoa Solar's notice of the Objection and opportunity for a hearing on the Objection were appropriate and no other notice need be provided; and this Court having reviewed the Objection and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Objection and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Objection is **SUSTAINED** as set forth in this Order.
2. Claim No. 1054 is hereby **DISALLOWED** and expunged in its entirety.
3. Abengoa Solar is authorized to update the Reorganized Debtors' claims register, as applicable, to reflect the relief granted in this Order.
4. This Order shall be effective immediately and enforceable upon its entry.
5. Abengoa Solar is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Objection.
6. This Order is without prejudice to Abengoa Solar's rights to: (a) object to the Claim on grounds other than as stated in the Objection if this Order is reversed on appeal; and (b) object, on any other available grounds, to any claim in these Debtors' estates.
7. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, and/or enforcement of this Order.

Dated: _____, 2020
Wilmington, Delaware

THE HONORABLE LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

Applicant Details

First Name	**Sam**
Middle Initial	**J**
Last Name	**Seneczko**
Citizenship Status	**U. S. Citizen**
Email Address	**sam.seneczko@gmail.com**
Address	**Address** Street **325 W Fullerton Pkwy** City **Chicago** State/Territory **Illinois** Zip **60614** Country **United States**
Contact Phone Number	**815-901-2263**

Applicant Education

BA/BS From	**Michigan State University**
Date of BA/BS	**May 2015**
JD/LLB From	**University of Illinois, College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp**
Date of JD/LLB	**May 11, 2019**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**University of Illinois Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Illinois**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Bankruptcy**

Recommenders

Luze, John R.
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Brubaker, Ralph
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Tabb, Charles
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References

John R. Luze, Partner at Kirkland & Ellis LLP; (312) 862-3369; john.luze@kirkland.com.

Professor Charles J. Tabb, University of Illinois College of Law; (217) 333-2877; ctabb@illinois.edu.

Professor Ralph Brubaker, University of Illinois College of Law; (217) 265-6740; rbrubake@illinois.edu.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Samuel J. Seneczko
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February 16, 2022
Chambers of the Honorable John D. Bates
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue, Northwest
Washington, DC 20001

Dear Judge Bates:

I am a third-year associate at Kirkland & Ellis writing to express my interest in becoming the rules law clerk in your chambers for the term beginning on August 30, 2022. Enclosed are my resume, writing sample, law school and undergraduate transcripts, and three letters of recommendation.

As a restructuring associate at Kirkland & Ellis, I have worked on a wide array of chapter 11 cases that embody complex procedural issues. From contested hearings and trials before bankruptcy courts, to appeals before the Eastern District of Virginia and Fifth Circuit, I have prepared memoranda, analyses, and pleadings on issues that involve the rules of evidence, bankruptcy, civil, and appellate procedure. My work at Kirkland tracks my longstanding interest in the rules of procedure, and I'm hopeful to utilize this experience as a clerk in your chambers.

During my time as a law student, I received the highest grades in both my civil procedure and bankruptcy procedure classes, and worked as a civil procedure teacher assistant for Professor Tammi Walker. Further, I have worked closely with academia as a research assistant for Professor Charles J. Tabb and the Managing Articles Editor for the University of Illinois Law Review, where I reviewed article submissions for publication.

Based on this experience, I am pursuing a clerkship to expand my knowledge and skillset in the various procedural rules that commercial and bankruptcy litigation encompass. I am confident that the foundation I have built at Kirkland and the University of Illinois will make me an excellent addition to your chambers.

Thank you very much for your consideration, and I hope to hear from you soon.

Sincerely,

Samuel J. Seneczko
325 W. Fullerton Pkwy, Apt. 301, Chicago, IL 60614
(815) 901-2263, sam.seneczko@gmail.com

EXPERIENCE

Kirkland & Ellis LLP, Chicago, IL
Associate September 2019–Present

- Drafted various litigation pleadings, including a circuit court appellate brief, oppositions to stay pending appeals, class action certification replies, confirmation briefs, disclosure statement replies, stipulated orders, and numerous procedural motions and objections.
- Prepared integral bankruptcy filings, including disclosure statements, chapter 11 plan of reorganizations, confirmation orders, and motions for emergency relief.
- Conducted contingency preparation for chapter 11 cases in retail, oil and gas, real estate, and energy industries and drafted numerous operational chapter 11 motions and objections.
- Researched and prepared memoranda for numerous legal issues, including bankruptcy, labor and employment, real property, oil and gas, contracts, constitutional law, corporate governance, and securities.
- Prepared various bankruptcy proof of claim procedures and processes, including claims objection procedures, de minimis claims procedures, and applicable bar dates.
- Negotiated consensual plan and confirmation order language, assumption and rejection of employment contracts and insurance policies, utility provider settlements, and automatic stay relief.
- Conducted parties-in-interest analysis, conflicts, and retention for debtor's counsel, advisors, and ordinary course professionals.
- Analyzed liability management strategies regarding director fiduciary duties, operating agreement amendments, credit agreement defaults, and multidistrict litigation.

Kirkland & Ellis LLP, Chicago, IL
Summer Associate May 2018–July 2018

- Drafted detailed memoranda regarding leveraged buyouts, applicable fraudulent transfer law, real property law, and international proceedings.
- Assisted with multinational chapter 15 filing and confirmation preparation for chapter 11 debtor.

Hon. Thomas M. Lynch, U.S. Bankruptcy Court for the Northern District of Illinois, Rockford, IL
Judicial Intern May 2017–July 2017

- Drafted various research memoranda, including an E-discovery memorandum on the Northern District of Illinois Discovery Pilot Program.
- Drafted bench memorandum and court order on the Bankruptcy Code's timing requirements for a creditor's proof of claim.

EDUCATION

University of Illinois College of Law, Champaign, IL
Juris Doctor, *magna cum laude* GPA: 3.72/4.00, Top 10% (Class Rank: 11T/133) May 2019

- *Order of the Coif*
- *University of Illinois Law Review*, Managing Articles Editor
    - Publication: *Madness in Medicare:* Bayou *Casts Uncertainty Over the Future of Nursing Facility Bankruptcies*, 2019 U. ILL. L. REV. 429
- Harno Scholar: Fall 2016; Dean's List: Spring 2017, Fall 2017, Spring 2018, Fall 2019, Spring 2019

Michigan State University, East Lansing, MI
Bachelor of Arts, History; GPA: 3.45/4.0 May 2015

BAR ADMISSIONS & MEMBERSHIPS

- Illinois (Admitted 2019), Northern District of Illinois, American Bankruptcy Institute

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MICHIGAN STATE UNIVERSITY

OFFICIAL ACADEMIC TRANSCRIPT
ISSUED TO STUDENT

PRINTED: 10/12/15
PAGE: 01 OF 01

UIC:0838550828

SENECZKO, SAMUEL JOHN

STUDENT ID: A44921870

COURSE	TITLE	CRS	GRADE	S/R H

PREVIOUS/TRANSFER INSTITUTIONS
DEKALB HIGH SCHOOL ATTENDED: 08/07 - 06/11
DE KALB IL

UNDERGRADUATE CREDIT
ADVANCED PLACEMENT
MSU SEM CREDITS ACCEPTED: 8.00

UNDERGRADUATE CREDIT

COURSE INFORMATION

FALL SEMESTER 2011 08/31/11 - 12/16/11

ADV	205	PRINCIPLES OF ADVERTISING	4		2.5
ISS	225	POWER AUTHORITY & EXCHANGE (D)	4		4.0
MTH	103	COLLEGE ALGEBRA	3		1.0
WRA	150	WRIT: EVOLUTION OF AMER THGHT	4		3.5

CUM CREDITS : 23.0 CUM GPA : 2.8666

SPRING SEMESTER 2012 01/09/12 - 05/04/12

HST	140	WORLD HISTORY TO 1500	4		4.0
IAH	207	LIT, CULTURES, IDENTITIES (I)	4		3.5
ISB	202	APPL ENVIR & ORGANISMAL BIO	3		3.5
ISB	208L	IS BIOLOGY LAB	2		4.0
PLS	160	INTRO TO INTERNTL RELATIONS	3		4.0

CUM CREDITS : 39.0 CUM GPA : 3.3387
DEAN'S LIST

SUMMER SEMESTER 2012 07/02/12 - 08/16/12

PLS	100	INTRO TO AMER NTL GOVERNMENT	3		4.0

CUM CREDITS : 42.0 CUM GPA : 3.3970

FALL SEMESTER 2012 08/29/12 - 12/14/12

IAH	221A	GREAT AGES ANCIENT WORLD (I)	4		3.0
ISP	221	EARTH ENVIRONMENT AND ENERGY	3		2.5
ISS	315	GLOBAL DIVRSTY/INTERDEPEND (I)	4		3.0
LTN	101	ELEMENTARY LATIN I	4		3.0

CUM CREDITS : 57.0 CUM GPA : 3.2448

SPRING SEMESTER 2013 01/07/13 - 05/03/13

ENT	205	PESTS, SOCIETY AND ENVIRONMENT	3		3.0
HST	304	THE AMERICAN CIVIL WAR	3		4.0
LTN	102	ELEMENTARY LATIN II	4		3.0
STT	200	STATISTICAL METHODS	3		2.0

CUM CREDITS : 70.0 CUM GPA : 3.1935

FALL SEMESTER 2013 08/28/13 - 12/13/13

HST	201	HISTORICAL METHODS AND SKILLS	3		4.0
HST	318A	U.S. CONSTITUTIONAL HISTORY I	3		4.0
HST	372	MIDDLE EAST: ISLAM & EMPIRES	3		4.0
KIN	103S	SWIM CONDITIONING	1		P
LTN	211	LIVY AND ROMAN HISTORIOGRAPHY	3		3.0

CUM CREDITS : 83.0 CUM GPA : 3.2837
DEAN'S LIST

SPRING SEMESTER 2014 01/06/14 - 05/02/14

HST	318B	U.S. CONSTITUTIONAL HISTORY II	3		3.5
LTN	208	CATULLUS AND LUCRETIUS	3		3.5
PLS	304	MINORITY POLITICS	3		3.5
PLS	320	THE AMERICAN JUDICIAL PROCESS	3		4.0

CUM CREDITS : 95.0 CUM GPA : 3.3313
DEAN'S LIST

----------END OF COLUMN----------

COURSE	TITLE	CRS	GRADE	S/R H

FALL SEMESTER 2014 08/27/14 - 12/12/14

GEO	330	GEOGRAPHY OF THE U.S. & CANADA	3		3.5
GEO	336	GEOGRAPHY OF EUROPE	3		4.0
HST	320	HISTORY OF MICHIGAN	3		4.0
HST	480	SEMINAR AMERICAN HISTORY (W)	3		4.0
KIN	106C	BOWLING I	1		P

CUM CREDITS : 108.0 CUM GPA : 3.3979
DEAN'S LIST

SPRING SEMESTER 2015 01/12/15 - 05/08/15

HST	324	HISTORY OF SPORT IN AMERICA	3		3.5
HST	328	MODERN U.S. MILITARY HISTORY	3		4.0
HST	483	SEM MODERN EUROPEAN HIST (W)	3		4.0
HST	490	INDEPENDENT STUDY	3		4.0

CUM CREDITS : 120.0 CUM GPA : 3.4500
DEAN'S LIST

BACHELOR OF ARTS GRANTED: 05/08/15
MAJOR: HISTORY
COLLEGE: SOCIAL SCIENCE
----------NO ENTRIES BELOW THIS LINE----------

PROVIDED SOLELY FOR:
SAMUEL SENECZKO
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Nicole G Rovig
University Registrar

MICHIGAN STATE UNIVERSITY

Office of the Registrar
Hannah Administration Building
426 Auditorium Road, Room 150
East Lansing, MI 48824-0210
Telephone (517) 355-3300

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Alteration of this transcript may be a criminal offense.

Accreditation

Michigan State University is a member of the Association of Public and Land-grant Universities, Association of American Universities, American Council on Education, American Council of Learned Societies, Association of Graduate Schools, Council of Graduate Schools, Committee on Institutional Cooperation, and International Association of Universities. The University has been accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools, 30 North LaSalle Street, Chicago, Illinois 60602-2504, (312)263-0456, www.ncahigherlearningcommission.org. Some individual programs, schools, and colleges have been recognized by the accrediting agencies in their respective fields. For a list, visit www.opb.msu.edu, select "Strategic Planning" and then "Agencies that Accredit MSU."

Transcript Validation and Authenticity

A transcript is official when it bears the signature of the University Registrar and the University seal in black ink, is obtained directly from the Office of the Registrar at Michigan State University, and is received by the person for whom it is intended. All paper-copy transcripts will be printed with black ink on paper with a green background which repeats "MICHIGAN STATE UNIVERSITY" over the entire page.

Calendar

The University offers instruction throughout the year during the fall semester, spring semester and summer sessions. Academic calendars are available at www.reg.msu.edu.

Credits

Effective Fall 1992 courses at Michigan State University are offered on a semester basis. One credit is equivalent to one instructor-student contact hour per week per semester plus two hours of study per contact hour; OR two hours of laboratory contact hours per week per semester, plus one additional hour spent in report writing and study; or other combinations of contact and study hours which constitute an equivalent of these experiences. Prior to Fall 1992 courses at Michigan State University were offered on a quarter basis.

To convert to quarter credits, the semester credits should be multiplied by 3/2.

Course Numbering System

001-099 – Non-Credit and Institute of Agricultural Technology Courses
100-299 – Undergraduate Courses
300-499 – Advanced Undergraduate Courses
500-599 – Graduate Courses prior to 1960
500-699 – Graduate – Professional Courses
800-899 – Graduate Courses
900-999 – Advanced Graduate Courses

Honors

An "H" in the Honors column indicates an honors course, honors section of a course, or the student took a non-honors course as honors. The latter indicates additional work was completed beyond normal requirements.

Grading System

The minimum cumulative grade-point average required for graduation is a 2.0 for undergraduate students and 3.0 for graduate students.

The Numerical System: 4.0, 3.5, 3.0, 2.5, 2.0, 1.5, 1.0, 0.0 – Credit is awarded for the following minimum levels – 1.0 for undergraduate students and 2.0 for graduate students. However, all grades are counted in the calculation of the grade-point average.

The Credit-No Credit System: CR-CREDIT – Credit was granted and represents a level of performance equivalent to or above the grade-point average required for graduation. NC-NO CREDIT – No credit was granted and represents a level of performance below the grade-point average required for graduation.

The Pass-No Grade System: P-PASS – Credit was granted and the student achieved a level of performance judged to be satisfactory by the instructor. N-NO GRADE – No credit was granted and the student did not achieve a level of performance judged satisfactory by the instructor.

Other Symbols Used: W-WITHDREW; V-VISITOR; U–UNFINISHED, I-INCOMPLETE; DF-DEFERRED; ET-EXTENSION; NGR-NO GRADE REPORTED; CP-CONDITIONAL PASS; & LDR-LATE DROP.

Grading Systems prior to Fall 1988: Please visit www.reg.msu.edu/transcripts.

Grade Point Average (GPA)

To compute the grade-point average for a semester, multiply the numerical grade by the number of credits for the course to obtain the total grade points. Then divide the total grade points for the semester by the total credits for the semester.

The minimum grade-point average required for graduation is 2.0 for undergraduate students and 3.0 for graduate students.

Courses in which P, I, N, DF, W, ET, CP, CR, NC, U or V have been received do not affect the grade-point average.

Grade Point systems prior to Summer 1972: Please visit www.reg.msu.edu/transcripts.

Repeated Courses

A course repeated is indicated in one of two ways:

1. By an R (Repeat) to the right of the "Descriptive Title", or

2. by an R (Repeat) in the SR column. In this case, you will also see an S (Superseded) in the SR column indicating the course being repeated.

For both formats term credit and grade-point average (GPA) totals are not adjusted for repeats in the term of the superseded course. The summary totals for the level of the student are adjusted to include only the last entry.

Withdrawal

A withdrawal from the University occurs when a student drops all courses within a semester. A student may voluntarily withdraw from the University prior to the end of the twelfth week of a semester or within the first 6/7 of the duration of the student's enrollment in a non-standard term of instruction (calculated in weekdays). Withdrawal is not permitted after these deadlines.

Courses in which the student is enrolled are deleted from the official record if the official voluntary withdrawal is before the middle of the term of instruction. If the official voluntary withdrawal is after the middle of the term of instruction, symbols are assigned by instructors to courses in which the student was enrolled as follows: W (no grade) to indicate passing or no basis for grade regardless of the grading system under which the student is enrolled, N to indicate failing in a course authorized for P-N grading, or 0.0 to indicate failing in a course authorized for numeric grading.

MSU is an affirmative-action, equal-opportunity employer.

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The following is an objection to the United States Trustee's motion for a stay pending appeal in the Bankruptcy Court for the Eastern District of Virginia (the "Bankruptcy Court"). The United States Trustee appealed the Bankruptcy Court's order confirming the Debtors' chapter 11 plan of reorganization (the "Plan") to the District Court for the Eastern District of Virginia challenging, among other things, the Plan's release provisions. Pending appeal, the United States Trustee moved for a stay of the Plan's third-party releases as a defense to mootness grounds on appeal. The Debtors responded with the below objection, which the Bankruptcy Court granted. The objection is public record filed on the Bankruptcy Court's docket. The only edits include minor non-substantive revisions. The below writing sample includes only the argument portion of the objection.

Trustee filed the *Statement of Issues to be Presented on Appeal and of Additional Items to be Included in the Record on Appeal* [Docket No. 2008].

ARGUMENT

THE U.S. TRUSTEE HAS NOT ESTABLISHED ANY OF THE FOUR ELEMENTS NECESSARY FOR A STAY PENDING APPEAL.

10. In determining whether to grant a stay pending appeal, this Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251, 256 (4th Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)) (quotation marks omitted); *see also Realvirt, LLC v. Lee*, 220 F.Supp.3d 704, 705 (E.D. Va. 2016). The U.S. Trustee fails to satisfy any of these factors.[4]

A. The U.S. Trustee Has Not Made a "Strong Showing" That It Is Likely to Succeed on the Merits.

1. Because the Plan is Already Effective, the U.S. Trustee's Appeal is Equitably Moot and Will Not Succeed on Appeal.

11. As an initial matter, the U.S. Trustee's appeal is likely to be dismissed as equitably moot. The Fourth Circuit has articulated that "the doctrine of equitable mootness is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable. Applied principally in bankruptcy proceedings because of the equitable

[4] Although the U.S. Trustee also cites *Nken* when setting forth the requirements for a stay pending appeal, it conspicuously omits that a movant must demonstrate a "strong showing" that it is likely to succeed on the merits. *See* Mot.5.

nature of bankruptcy judgments, equitable mootness is often invoked when it becomes impractical and imprudent to 'upset the plan of reorganization at this late date.'" *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002) (quoting *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994)).

12. Specifically, in determining whether an appeal is equitably moot, the Fourth Circuit considers: (1) whether the appellant sought and obtained a stay; (2) whether the reorganization plan or other equitable relief ordered has been substantially consummated; (3) the extent to which the relief requested on appeal would affect the success of the reorganization plan or other equitable relief granted; and (4) the extent to which the relief requested on appeal would affect the interests of third parties. *Mac Panel Co.*, 283 F.3d at 625. Under all applicable factors, the U.S. Trustee's appeal is equitably moot.

13. First, although the U.S. Trustee is seeking a stay pending appeal, the Motion is ineffective to satisfy the first requirement set forth above due to the U.S. Trustee's delayed timing. Courts in this District have recognized that an appeal may be equitably moot where the appellant failed to move for a stay pending appeal on an expedited basis. *See, e.g.*, *Mar-Bow Value Partners, LLC v. McKinsey Recovery & Transformation Serv. US, LLC*, 578 B.R. 325 (Bankr. E.D. Va. 2017) (rendering an appeal equitable moot, in part, because the movant failed to request a stay on an expedited basis and the bankruptcy court did not hear the motion until one month after the plan had become effective). Here, the Motion was filed over a month after confirmation and nearly 30 days after the Effective Date (and after the U.S. Trustee had already taken the full amount of time to notice an appeal), significantly longer than the expedited timeline necessary to prevent equitable mootness.

14. Second, the Plan has been substantially consummated both by its terms and in light of the transactions undertaken prior to and on the Effective Date. Courts in this District and others have held that a plan is substantially consummated both by its terms and due to certain core transactions that cannot easily be unwound. *See, e.g.*, *Mar-Bow Value Partners*, 578 B.R. at 349–50 (holding that a plan was "substantially consummated" on the Effective Date by its own terms and also because several transactions—mainly, a sale APA, assumption and assignment of contracts and leases, and numerous settlements of claims—were approved by the Bankruptcy Court on the Effective Date); *see also In re Shawnee Hills, Inc.*, 125 F. App'x 466, 470 (4th Cir. 2005) (finding an appeal equitably moot when hundreds of employees cashed checks issued under the Plan); *Mac Panel Co.*, 283 F.3d at 622 (reasoning an appeal was moot when disputed claims were settled and at least 19 creditors had been paid under the Plan); *Tribune Media Co. v. Aurelius Capital Mgmt., L.P.*, 799 F.3d 272, 279 (3d Cir. 2015) ("We decline to disturb complex transactions undertaken after the Plan was consummated that would be most difficult to unravel.") (internal citations omitted). In this case, Article IX.C of the Plan provides that the Plan is "substantially consummated," as defined in section 1102(2) of the Bankruptcy Code, on the Effective Date.

15. Additionally, the Reorganized Debtors already consummated a series of transactions contemplated under the Plan, including an initial distribution of approximately $56 million to prepetition lenders, the cancellation of shares, the rejection and assumption or assumption and assignment of executory contracts and unexpired leases, the removal of the Board of Directors and discharge of their duties, the implementation of a plan administrator, the establishment and funding of a GUC Trust, and appointment of a GUC Trustee. If the U.S. Trustee

wins its appeal and is permitted to rewrite core components of the global settlement, the Reorganized Debtors would be faced with the impossible task of unwinding these actions.

16. Third, the U.S. Trustee specifically asserts that the "releases and exculpation clause were not essential to the viability of the Plan" because the Plan contained a severability provision. However, this Court specifically heard arguments at the Confirmation Hearing and noted in its Memorandum Opinion that the release provisions were integral to the plan and critical to its success. *See* Memorandum Opinion, at *8 ("The Debtor Releases, the Third-Party Releases, and the Exculpation Provisions were an integral part of the parties' negotiations in reaching a successful restructuring . . . . They served to avoid entanglement of the estates in expensive and protracted post-confirmation litigation that could only delay and dilute the negotiated distributions."). Additionally, courts in this District have found that a challenge to a plan's release provision "would risk not only disrupting the core transaction of the Plan . . . but unraveling the 'web of interrelated settlements that had been painstakingly woven together' and the 'hard-fought global peace' that the Plan achieved." *Mar-Bow*, 578 B.R. at 350–51. Similarly, the release and exculpation provisions here were found by the Court to be central the plan's success because they were heavily negotiated and a critical part of the deal embodied in the Plan. Finally, Article XII.J ("Nonseverability of Plan Provisions") of the Plan itself provides:

> The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is: (1) valid and enforceable pursuant to its terms; (2) integral to the Plan and may not be deleted or modified without the Debtors' or the Reorganized Debtors' consent, as applicable; and (3) nonseverable and mutually dependent.

Excising the release and exculpation provisions would completely undermine the global settlement in the Plan that the Debtors' creditors voted to approve.

17. Lastly, as further discussed below, a challenge to the Plan's release provisions has a direct effect on third parties because parties have relied on the confirmation order, a significant amount of money has been distributed to prepetition lenders, and settlements have been effectuated. *See Mac Panel Co.*, 283 F.3d at 626 (reasoning that granting relief on appeal "would adversely affect third parties who have already been paid and who have relied on the implementation of the reorganization plan to date . . . . A significant amount of money was distributed and numerous promises were made based on the assumption that MAC Panel had successfully reorganized."); *see also In re U.S. Airways Group, Inc.*, 369 F.3d 806 (4th Cir. 2004) (denying reversal when the relief requested would undo the plan and adversely impact the interests of third parties who have relied upon consummation of the confirmation order). Here, the plan has been consummated. The Reorganized Debtors paid approximately $56 million in distributions to prepetition lenders, assumed and assigned or rejected executory contracts and unexpired leases, cancelled existing shares, funded claims reserves and a GUC Trust, and established a plan administrator that has continued to negotiate with litigation claimants on the expectation that the releases and/or opt outs are effective. These actions are now impossible to unwind and it would be inequitable to excise an integral component of a global resolution after the fact.

18. In short, because its appeal is equitably moot, the U.S. Trustee has not made the requisite "strong showing" that it is likely to succeed on the merits of its appeal.

2. Even if the U.S. Trustee's Appeal Is Not Equitably Moot, the U.S. Trustee Has Not Otherwise Shown They Are Likely to Succeed on Appeal under Fourth Circuit Precedent.

19. Even if the U.S. Trustee's appeal is not equitably moot, the U.S. Trustee has nevertheless failed to make a "strong showing" that it is likely to succeed on the merits of its appeal. *Sierra Club*, 981 F.3d at 256.

20. In its Motion, the U.S. Trustee restates the same arguments against the Plan's third-party release and exculpation provisions that this Court rejected in granting the Confirmation Order. Such a retread of ground that has already been covered is insufficient to meet the U.S. Trustee's burden. *See Rose v. Logan*, 2014 WL 3616380, at *3 (D. Md. 2014) (ruling that the movant failed to meet the burden of showing likelihood of success on the merits because the movant did little but restated the same objections previously raised, and focusing great weight on the fact that the Bankruptcy Court had made multiple findings of fact in favor of the appellee). Additionally, the U.S. Trustee has not put forward any new evidence to suggest that the district court would reach a different result or that would undermine the extensive findings supporting the third-party releases and exculpation provisions. *See O'Brien v. Appomattox Cty.*, No. 6:02 CV 00043, 2002 U.S. Dist. LEXIS 22554, at *3 (W.D. Va. Nov. 15, 2002) ("The Defendants have not produced any new evidence which would support a likelihood of success on the merits with respect to the state law claims. Therefore, this Court concludes that the Defendants do not have a likelihood of success on the merits . . . .").

21. As the Court noted both at the Confirmation Hearing and in its Memorandum Opinion, "[i]t is only where the releases included in a plan are non-consensual must the Court turn to the heightened standard of scrutiny imposed by the Fourth Circuit in *Berhmann v. National Heritage Foundation* . . . ." *See* Memorandum Opinion, at *30; *see also* February 25, 2021 Confirmation Hrg. Tr. 110:15-18 ("And what we've had here is a lot of argument why *National Heritage* factors are applicable to this case. They're not. These were consensual releases. I've held that in prior cases."). Thus, contrary to the U.S. Trustee's argument, Fourth Circuit precedent does not require courts to consider all *Berhmann* factors when releases are consensual. Additionally, the Court found that the Debtors provided all parties with sufficient notice and the

opportunity to opt-out necessary to deem the releases consensual in this case. *See* Memorandum Opinion, at *13. The Court applied the correct standard when it considered the Plan's releases, and such releases were appropriately approved.

22. With respect to the exculpation provisions, the Court specifically found that "uncontroverted evidence established that [the] Exculpation Provision is narrowly tailored and appropriate under the circumstances of these Bankruptcy Cases." Memorandum Opinion, at *39. Again, the U.S. Trustee simply restates the same arguments heard at the Confirmation Hearing and fails to put forth any new evidence necessary to make a clear showing that the district court would reach a different result on appeal. Here, the exculpation provisions were found to provide a necessary protection that is fundamental in implementing the Plan and well within the law of this District. Accordingly, the U.S. Trustee has not shown it will succeed on the merits on appeal.

B. The U.S. Trustee Will Not Suffer Irreparable Harm.

23. Additionally, the U.S. Trustee does not explain how it, or parties it purports to argue on behalf of, will be irreparably harmed if the stay is denied. *See BDC Capital*, 508 B.R. at 640 (declining to grant a stay where irreparable harm was not present).

24. It is a fundamental precept of remedies law that alleged irreparable harm must be concrete and identifiable. *See Wis. Gas Co. v. Fed. Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1984); *In re ANC Rental Corp.*, 2002 WL 1058196, at *2 (D. Del. May 22, 2002). Movants seeking a stay must present specific evidence of the injuries suffered—merely relying on on speculation, conjecture, or hyperbole is not sufficient to obtain injunctive relief. *See Deluna v. Del. Harness Racing Comm'n*, No. 19-1788 (MN), 2019 WL 5067198, at *3 (D. Del. Oct. 9, 2019) (citing *Campbell Soup Co. v. ConAgra, Inc.*, 977 F.2d 86, 92 (3d Cir. 1992)) ("Additionally, [applicants] must present evidence of the injuries suffered or impending—argument paired with conclusory allegations alone is insufficient.").

25. Here, the U.S. Trustee asserts that "parties who unknowingly and unintentionally released their causes of action by failing to opt-out will be irreparably harmed should the statute of limitations applicable to their cause of action expire during the pendency of the appeal." UST Obj., at *13. But the U.S. Trustee does not cite a single case supporting this proposition or holding that the irreparable-harm prong is satisfied in these circumstances. Similarly, the U.S. Trustee fails to provide concrete evidence of any irreparable harm that would actually result if the releases were not stayed. The U.S. Trustee does not identify specific parties, causes of action, or statute of limitation periods that may run as a result of the approved releases. To carry its burden for obtaining injunctive relief, the U.S. Trustee must proffer specific evidence instead of mere speculation or conjuncture on potential causes of action or statute of limitation periods.

26. All parties were given notice, an opportunity to opt-out, and, if they did not opt-out, received a release themselves. Merely failing to participate in the process alone does not constitute grounds to later assert irreparable harm: "You have to take some action. And the parties were put on notice, and the notice they got could not have been any clearer. . . . But they got to choose, and I think that that's fundamental to our jurisprudence, and it worked in this case." Confirmation Hrg. Tr. 110:24-25, 111:1-18. Accordingly, the U.S. Trustee has not demonstrated a showing of irreparable harm.

C. Non-Moving Parties Will Be Substantially Injured If a Stay Is Granted.

27. In contrast to the lack of demonstrated harm to the U.S. Trustee or any other party from the failure to enter a stay, issuance of a stay would "substantially injure" the many other parties to these chapter 11 cases who have relied on the finality of the Confirmation Order. *Sierra Club*, 981 F.3d at 256. The U.S. Trustee's assertion that granting a stay will not unfairly upset the expectations of other parties because of the Plan's non-severability provision or the U.S. Trustee's

objection fails under the plain language of the Plan itself and the applicable Fourth Circuit case law.

28. Generally, a stay should not be granted when the balance of the equities disfavors such relief. *See BDC Capital, Inc.*, 508 B.R. at 640 (requiring the balance of the likelihood of irreparable harm to the movant against the likelihood of substantial harm to non-movants to weigh in the movant's favor). Courts examine whether granting a stay is highly inequitable to other creditors who have relied on the confirmed plan, or otherwise disturbs the global peace reached in the Plan. *See id.* (declining to grant a stay that would "substantially harm the other parties" involved). Additionally, courts in the Fourth Circuit have recognized that granting an injunction or otherwise overturning relief granted in a confirmation order would adversely impact the interests of third parties who relied on the confirmation order. *See, e.g.*, *Mac Panel Co.*, 283 F.3d at 626 (reasoning that granting relief on appeal "would adversely affect third parties who have already been paid and who have relied on the implementation of the reorganization plan to date . . . ."); *In re U.S. Airways Group, Inc.*, 369 F.3d 806 (4th Cir. 2004) (denying reversal when the relief requested would undo the plan and adversely impact the interests of third parties who have relied upon consummation of the confirmation order); *Mar-Bow*, 578 B.R. at 351 (reasoning that disrupting release and exculpation provisions would interfere with interconnected settlements, thereby affecting third-parties who rely on the finality of bankruptcy confirmation orders).

29. As an initial matter, U.S. Trustee incorrectly categorizes the Plan's non-severability provision and the provision permitting alterations. The Plan's non-severability provision provides that "[i]f, *before Confirmation*, any term or provision is held by the *Bankruptcy Court* to be invalid, void, or unenforceable, the *Bankruptcy Court* shall have the power to alter and interpret such provision . . . ." and further provides "[t]he Confirmation Order shall constitute a judicial

determination and shall provide that each term and provision of the Plan, as it *may have been* altered or interpreted . . . ." *See* Plan, Art XII.J (emphasis added). By its terms, the Plan only provided authority for severability for *pre-confirmation* findings or alterations made *before* confirmation. However, this provision, by its terms, does not contemplate selective, post-confirmation editing of the Plan's provisions.

30. Selective enforcement of the Plan also could upset the holistic deal reached by the Debtors and their creditors, as noted by the Court at the Confirmation Hearing:

> I can't rewrite the plan, can I? I'm not allowed to red-line it or -- I mean, this is a plan that has been put together by all parties, been voted on by the creditors that are entitled to vote . . . . Why can I just say well, I'm going to approve this part of the plan and not that part? Don't I have to take it as a whole or leave it as a whole?

Confirmation Hrg. Tr. 70:11-17. The Reorganized Debtors respectfully submit that the Court should again refuse to undermine the finality and comprehensive nature of the Plan through selective enforcement of the Plan's critical provisions. The Plan is the result of a global settlement that was extensively negotiated by numerous parties. Those same parties viewed the third-party releases as an integral part of the Plan. *See* Memorandum Opinion, at *8 ("The Debtor Releases, the Third-Party Releases, and the Exculpation Provisions were an integral part of the parties' negotiations in reaching a successful restructuring . . . . They served to avoid entanglement of the estates in expensive and protracted post-confirmation litigation that could only delay and dilute the negotiated distributions."). The U.S. Trustee's requested stay undermines that global peace and threatens to undo the Plan's transactions.

31. Additionally, the U.S. Trustee's suggestion that its own objection should notice parties of the potential for extraordinary selective enforcement of the Plan likewise fails to demonstrate a lack of harm should the releases and exculpation provisions be stayed. The mere filing of an objection—with no regard to merit—should not impugn such foresight. Even assuming

every creditor affected by the releases reviewed all 113 confirmation objections, including the U.S. Trustee's objection, it would not be unreasonable for creditors to assume that the Plan's releases would nevertheless be approved as consistent with Fourth Circuit precedent.

32. Further, the confirmation objections would not put parties on notice that the Court would alter provisions *at this juncture* contrary to the Plan's plain language and long after the objections were overruled and the Plan was confirmed. Nor does it follow that, because the Plan contains a non-severability provision, the releases and exculpation provisions are not an integral part of the Plan. This argument is directly contradicted by the Court's finding that the releases were integral to success of the restructuring. *See id.*

33. The Effective Date of the Plan has already occurred and the settlements embodied in the Plan, including the third-party releases and exculpation provisions, went effective on that date. After that date, the Reorganized Debtors distributed approximately $56 million dollars in funds to prepetition creditors, cancelled existing shares, removed the existing Board of Directors, implemented a Plan Administrator who has been negotiating with numerous claimants, and formed a GUC Trust. To undo the third-party releases would unjustly threaten to unwind a global settlement, jeopardizing the relief that hundreds of third-parties have relied upon. Accordingly, the U.S. Trustee has failed to demonstrate how these parties will not be harmed as a result of granting the stay.

D. Public Interest Considerations Weigh Against Granting the Stay.

34. The U.S. Trustee asserts that granting the stay serves public interest because there is "considerable tension" among courts related to third-party releases, the Plan involves "the ability of certain parties to use the reorganization process to induce unsuspecting non-debtor parties to release any claims they may have against other non-debtor parties in ways not contemplated by the Bankruptcy Code," and finally, the Plan brings into question "[t]he integrity of the bankruptcy

system. . . . [which] depends on public confidence in its procedures and transparency." UST Obj., at *15. These arguments are unpersuasive.

35. First, as this Court noted, consensual non-debtor releases utilizing opt-out mechanics are consensual, "consistent with the jurisprudence of this jurisdiction[,]" and a widely accepted practice. *See* Memorandum Opinion, at *31 ("Most courts allow consensual nondebtor releases to be included in a plan . . . ."); *see, e.g.*, *In re Pier 1 Imports, Inc.*, No. 20-30805 (KRH) (Bankr. E.D. Va. June 24, 2020) (confirming plan); *In re Toys "R" Us, Inc.*, Case No. 17-34665 (KLP) (Bankr. E.D. Va. Dec. 17, 2018) (confirming the plan for the Taj and TRU Inc. entities); *In re The Gymboree Corp.*, No. 17-32986 (Bankr. E.D. Va. Sept. 7, 2017); *In re Penn Virginia Corp.*, No. 16-32395 (Bankr. E.D. Va. Aug. 11, 2016); *In re Patriot Coal Corp.*, No. 15-32450 (Bankr. E.D. Va. Oct. 9, 2015); *In re Movie Gallery, Inc.*, No. 07-33849 (DOT**) (**Bankr. E.D. Va. Apr. 10, 2008).

36. Second, it is incorrect to assert that the Plan and process in these chapter 11 cases induced unsuspecting parties or otherwise brought into question the transparency of the bankruptcy system. The Debtors ran a fully transparent process throughout the duration of the case. At every step, the Debtors worked to ensure they maintained an extensive noticing program by providing actual notice of all hearings, sales, orders, and releases, and several notices in national publications. *See* Memorandum Opinion, at * 12–13. Actual notice of third-party releases was provided to over 300,000 parties. *See* Memorandum Opinion, at *13. There is nothing to suggest that any of the parties were not aware of the releases agreed upon under the Plan or were unsuspecting of treatment under the Plan.

37. Lastly, bankruptcy policy favors finality and the "expedient administration of bankruptcy proceedings." *See, e.g.*, *In re Adelphia Commc'ns Corp.*, 361 B.R. at 349

("[C]ompromises are favored in bankruptcy precisely for the reason that they minimize litigation and expedite the administration of a bankruptcy estate."). While the law permits the stay pending appeal of an order "where the high standards for a stay are met . . . where, as here, those standards are not met, a stay pending appeal would injure the interests of sound case management in the bankruptcy process, and as a consequence, would also injure the public interest." *In re 473 W. End Realty Corp.*, 507 B.R. 496, 508 (Bankr. S.D.N.Y. 2014).

38. The Reorganized Debtors have emerged from the chapter 11 cases and continually demonstrated sound and efficient case management to maximize the value of the estates. The Reorganized Debtors acknowledge the U.S. Trustee's focus on maintaining public confidence in the bankruptcy process and procedures, which is why the Reorganized Debtors undertook an extensive noticing process and worked to run a fully transparent and efficient chapter 11 process. Additionally, parties who participated in the bankruptcy process should feel confident in relying on the Reorganized Debtors' confirmed Plan and the ability to rely on the finality of relief granted in the Confirmation Order.

39. Accordingly, the U.S. Trustee has failed to show that the public interest is served by granting a stay and, for this and the other reasons set forth above, the Reorganized Debtors respectfully submit that the Court should deny the Motion.

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Applicant Details

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Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2018**
JD/LLB From	**Vanderbilt University Law School** **http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx**
Date of JD/LLB	**May 16, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Vanderbilt Journal of Entertainment and Technology Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	

Bar Admission

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

7 Surry Court
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5/16/22

The Honorable John D. Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I am a 2022 graduate of Vanderbilt Law School, writing to be considered for a clerkship in your chambers.

My experiences during law school have positioned me to be an effective clerk. During my internship at the Maryland Court of Appeals, I had the chance to see how judicial chambers operate. Last summer, I worked at the IP firm, Sterne Kessler, where I gained experience working with various aspects of complex litigation, including patent law and habeas petitions. Finally, I have also developed my legal research and editing skills on the *Vanderbilt Journal of Entertainment and Technology Law*.

I greatly appreciate your consideration for a position as a clerk in your chambers. Enclosed are a resume, transcripts, writing sample, and letters of recommendation. My last semester of grades will not be available until June—if needed, I am happy to provide my updated transcript when it is available.

Sincerely,

David Silversmith

David Silversmith

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Education

VANDERBILT UNIVERSITY LAW SCHOOL, Nashville, TN
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Honors and Activities:
Dean's Scholar, VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW (Publication Editor), Moot Court, Vanderbilt Fútbol Club

UNIVERSITY OF MARYLAND, College Park, MD
B.S., Biological Sciences: Physiology & Neurobiology, B.S., Psychology, May 2018
GPA: 3.726
Honors and Activities:
Dean's List, Psychology National Honor Society, TA: UNIV100

Work Experience

STERNE, KESSLER, GOLDSTEIN & FOX, Washington, D.C.
Summer Associate (offer extended):
Performed research related to various aspects of patent litigation, such as attorney work product and damages; prepared reply brief for pro bono habeas case.
Summer 2021

THE HONORABLE MARY ELLEN BARBERA, MARYLAND COURT OF APPEALS, Rockville, MD
Judicial Intern:
Researched evidence and employment law cases; wrote two bench memos to prepare the Chief Judge for oral arguments.
Summer 2020

DELOITTE CONSULTING, Rosslyn, VA
Business Technology Analyst:
Collaborated with technical and functional leads throughout the Department of Defense to streamline financial systems; strategized with Internal Revenue Service project managers to accelerate the end date for a system modernization effort by six months.
September 2018 – August 2019

CENTER FOR ADVANCED STUDY OF LANGUAGE, College Park, MD
Language Science Scholar:
Developed a research study using Python focusing on how humans are able to understand complex language; presented results of study to experts in the field of psycholinguistics.
Summer 2016

Personal

Interests include Premier League soccer, running, and geography.

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Law Academic Record (4.0 Grade System)

2019 Fall

LAW	6010	**Civil Procedure**	4.00	**A-**	14.80
Instructor:		Ingrid Wuerth			
LAW	6020	**Contracts**	4.00	**A-**	14.80
Instructor:		Rebecca Allensworth			
LAW	6040	**Legal Writing I**	2.00	**A-**	7.40
Instructor:		Rachael Andersen-Watts Alicia Hoke			
LAW	6060	**Life of the Law**	1.00	**P**	0.00
Instructor:		Ganesh Sitaraman Timothy Meyer			
LAW	6090	**Torts**	4.00	**A-**	14.80
Instructor:		James Rossi			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	15.00	14.00	51.80	3.700
CUMULATIVE:	15.00	14.00	51.80	3.700

2020 Spring

LAW	6030	**Criminal Law**	3.00	**P**	0.00
Instructor:		Susan Kay			
LAW	6050	**Legal Writing II**	2.00	**P**	0.00
Instructor:		Rachael Andersen-Watts Alicia Hoke			
LAW	6070	**Property**	4.00	**P**	0.00
Instructor:		Christopher Serkin			
LAW	6080	**Regulatory State**	4.00	**P**	0.00
Instructor:		Lisa Bressman			
LAW	7020	**Antitrust Law**	3.00	**P**	0.00
Instructor:		Rebecca Allensworth			

During the Spring 2020 semester, Vanderbilt University was affected by the global COVID-19 pandemic. Instructional methods were modified and temporary changes to grading policy were implemented, including adjustments to the options for pass/fail grading. For more information, see: https://registrar.vanderbilt.edu/transcripts/transcript-key.php.

	EHRS	QHRS	QPTS	GPA
SEMESTER:	16.00	0.00	0.00	0.000
CUMULATIVE:	31.00	14.00	51.80	3.700

2020 Fall

LAW	5790	**Jrn'l Ent & Tech Law**	0.00	**P**	0.00
Instructor:		Daniel Gervais			
LAW	5900	**Moot Court Competition**	1.00	**P**	0.00
Instructor:		Susan Kay Chandler Ray			
LAW	7078	**Constitutional Law I**	3.00	**A-**	11.10
Instructor:		Timothy Meyer			
LAW	7116	**Corporations & Bus. Ent.**	4.00	**B+**	13.20
Instructor:		Amanda Rose			
LAW	7244	**Intellectual Prop Survey**	4.00	**A-**	14.80
Instructor:		Joseph Fishman			
LAW	8130	**Mntl Hlth Law: Dep Life&Lbrty**	2.00	**A-**	7.40
Instructor:		Christopher Slobogin			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	14.00	13.00	46.50	3.576
CUMULATIVE:	45.00	27.00	98.30	3.640

2021 Spring

LAW	5790	**Jrn'l Ent & Tech Law**	1.00	**P**	0.00
Instructor:		Daniel Gervais			
LAW	7084	**Copyright Law**	3.00	**A-**	11.10
Instructor:		Joseph Fishman			
LAW	7180	**Evidence**	4.00	**A-**	14.80
Instructor:		Edward Cheng Ramon Ryan			
LAW	7214	**Health Care Fraud and Abuse**	2.00	**A**	8.00
Instructor:		Matthew Curley Brian Roark			
LAW	7700	**The Practice of Aggregate Lit**	2.00	**A**	8.00
Instructor:		Mark Chalos John Spragens Kenneth Byrd			
LAW	8081	**Role of In-House Counsel**	1.00	**P**	0.00
Instructor:		Tatjana Stoljarova			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	13.00	11.00	41.90	3.809
CUMULATIVE:	58.00	38.00	140.20	3.689

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David Silversmith
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BART P. QUINET
UNIVERSITY REGISTRAR
Date: 01/11/2022

OFFICE OF THE UNIVERSITY REGISTRAR
NASHVILLE, TENNESSEE 37240

VANDERBILT UNIVERSITY

Name : David Silversmith
Student # : 000612218
Birth Date : 11/30

2021 Fall

LAW	5790	**Jrn'l Ent & Tech Law**	1.00	**P**	0.00
Instructor:		Daniel Gervais			
LAW	7000	**Administrative Law**	3.00	**A-**	11.10
Instructor:		Kevin Stack			
LAW	7006	**Advanced Legal Research**	2.00	**P**	0.00
Instructor:		Clanitra Nejdl			
LAW	7380	**JET Law Pub Note**	1.00	**P**	0.00
Instructor:		Daniel Gervais			
LAW	7438	**Law Practice 2050**	3.00	**A**	12.00
Instructor:		John Ruhl			
LAW	8400	**Trial Advocacy**	3.00	**P**	0.00
Instructor:		Dumaka Shabazz Martesha Johnson			
LAW	9167	**Venture Capital Seminar**	3.00	**A-**	11.10
Instructor:		Brian Broughman			

	EHRS	QHRS	QPTS	GPA
SEMESTER:	16.00	9.00	34.20	3.800
CUMULATIVE:	74.00	47.00	174.40	3.710

---------- NO ENTRIES BELOW THIS LINE ----------

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BART P. QUINET
UNIVERSITY REGISTRAR
Date: 01/11/2022

UNOFFICIAL TRANSCRIPT
FOR ADVISING PURPOSES ONLY
As of: 12/22/19

Silversmith, David Michael
E-Mail: dsilvs96@gmail.com
Major: Biological Sciences: Physiology & N
Transfer - From 2-Year Institution Undergraduate Degree Seeking
GenEd Program Current Status: Registered Spring 2018
Double Degree: PSYCHOLOGY

Fundamental Requirement Satisfied Math: AP; English: ENGL Course

Transcripts received from the following institutions:

Advanced Placement Exam on 07/11/14

** Transfer Credit Information **			** Equivalences **	
Advanced Placement Exam				
1201 U.S. GVPT/SCR 4	P	3.00	GVPT170	DSHS
1301 BIOLOGY/SCR 4	P	4.00	BSCI105	DSNL
BIOLOGY/SCR 4	P	4.00		L1
WORLD HISTORY/SCR 4	P	3.00		L1
1401 CHEMISTRY/SCR 5	P	3.00	CHEM131	DSNL
CHEMISTRY/SCR 5	P	2.00	CHEM271	
CHEMISTRY/SCR 5	P	1.00	CHEM132	
CALCULUS AB/SCR 5	P	4.00	MATH140	FSAR, FSMA
Acceptable UG Inst. Credits:		**24.00**		
Applicable UG Inst. Credits:		**24.00**		
Total UG Credits Acceptable:		**24.00**		
Total UG Credits Applicable:		**24.00**		

Historic Course Information is listed in the order:
Course, Title, Grade, Credits Attempted, Earned and Quality Points

Fall 2014
MAJOR: BIOLOGICAL SCIENCES COLLEGE: COMP, MATH, & NAT SCI

BSCI106C	PRIN BIOL II	A-	4.00	4.00	14.80	DSNL
INAG110	ORAL COMMUNICATION	A-	3.00	3.00	11.10	FSOC
MATH131	CALC II FOR LIFE SCIENCE	B+	4.00	4.00	13.20	
PSYC100	INTRO PSYCHOLOGY	A	3.00	3.00	12.00	DSHS or DSNS
UNIV100	STUDENT IN UNIVERSITY	A+	1.00	1.00	4.00	

**** Semester Academic Honors ****
Semester: Attempted 15.00; Earned 15.00; GPA 3.673
UG Cumulative: 15.00; 15.00; 3.673

Spring 2015
MAJOR: BIOLOGICAL SCIENCES COLLEGE: COMP, MATH, & NAT SCI
Double Major: PSYCHOLOGY

BSCI207	PRIN BIOL III ORGANISMAL	B	3.00	3.00	9.00	
CHEM231	ORGANIC CHEMISTRY I	A-	3.00	3.00	11.10	
CHEM232	ORGANIC CHEM LAB I	B-	1.00	1.00	2.70	
ENGL101	ACADEMIC WRITING	B	3.00	3.00	9.00	FSAW
MUSC205	HIST OF POPULR MUSIC	A	3.00	3.00	12.00	DSHU
PSYC200	STAT METH IN PSYCH	A	3.00	3.00	12.00	FSAR

Semester: Attempted 16.00; Earned 16.00; GPA 3.487
UG Cumulative: 31.00; 31.00; 3.577

Summer I 2015
MAJOR: BIOLOGICAL SCIENCES COLLEGE: COMP, MATH, & NAT SCI
Double Major: PSYCHOLOGY

PHIL140	CONTEMP MORAL ISSUES	A-	3.00	3.00	11.10	DSHU

Semester: Attempted 3.00; Earned 3.00; GPA 3.700
UG Cumulative: 34.00; 34.00; 3.588

Fall 2015
MAJOR: BIOLOGICAL SCIENCES COLLEGE: COMP, MATH, & NAT SCI
Double Major: PSYCHOLOGY

BSCI222	PRIN GENETICS	B	4.00	4.00	12.00	
CHEM241	ORGANIC CHEMISTRY II	B+	3.00	3.00	9.90	
CHEM242	ORGANIC CHEM LAB II	C	1.00	1.00	2.00	
PSYC123	PSYC OF GETTING HIRED	A+	1.00	1.00	4.00	
PSYC289D	LIVING THE GOOD LIFE	A	3.00	3.00	12.00	DSHS, SCIS
PSYC300	RSRCH MTHDS PSYC LAB	A+	4.00	4.00	16.00	DSSP

**** Semester Academic Honors ****
Semester: Attempted 16.00; Earned 16.00; GPA 3.493
UG Cumulative: 50.00; 50.00; 3.558

Winter 2016
MAJOR: BIOLOGICAL SCIENCES COLLEGE: COMP, MATH, & NAT SCI
Double Major: PSYCHOLOGY

PSYC334	PSYC OF INTERPSNL REL	A+	3.00	3.00	12.00	

Semester: Attempted 3.00; Earned 3.00; GPA 4.000
UG Cumulative: 53.00; 53.00; 3.583

Spring 2016
MAJOR: BIOLOGICAL SCIENCES COLLEGE: COMP, MATH, & NAT SCI
Double Major: PSYCHOLOGY

BSCI330	CELL BIO & PHYSIOLOGY	A+	4.00	4.00	16.00	

```
     CHEM272  GEN BIOANALYT CHEM LAB   B+ 2.00  2.00  6.60
     PSYC221  SOCIAL PSYCHOLOGY        A+ 3.00  3.00 12.00 DSHS or DSSP
     PSYC301  BIO BASIS OF BEHAV       A+ 3.00  3.00 12.00
     PSYC361  SURVEY IND&ORG PSY       A  3.00  3.00 12.00
     PSYC479  SPECIAL RES PROB         A  2.00  2.00  8.00
** Semester Academic Honors **
Semester:       Attempted 17.00; Earned 17.00; GPA 3.917
UG Cumulative:            70.00;        70.00;     3.664

Fall 2016
MAJOR: BIOLOGICAL SCIENCES       COLLEGE: COMP, MATH, & NAT SCI
Double Major: PSYCHOLOGY
     BCHM461  BIOCHEMISTRY I           A  3.00  3.00 12.00
     BSCI189I HMN BIOLOGICAL DIVERSITY A+ 4.00  4.00 16.00 DSNL or DSSP, DVUP, SCIS
     PHYS131  FUND PHYS LIFE SCI I     A  4.00  4.00 16.00
     PSYC435  THEOR PERS & PSYCHOTHRPY A+ 3.00  3.00 12.00
     PSYC479  SPECIAL RES PROB         A  2.00  2.00  8.00
** Semester Academic Honors **
Semester:       Attempted 16.00; Earned 16.00; GPA 4.000
UG Cumulative:            86.00;        86.00;     3.726

Spring 2017
MAJOR: BIOLOGICAL SCIENCES       COLLEGE: COMP, MATH, & NAT SCI
Double Major: PSYCHOLOGY
     BSCI353  PRINC OF NEUROSCIENCE    A  3.00  3.00 12.00
     BSCI454  NEUROBIOLOGY LABORATORY  A  1.00  1.00  4.00
     PHYS132  FUND PHYS LIFE SCI II    A- 4.00  4.00 14.80
     PSYC425  PSYCHOLOGY AND LAW       A  3.00  3.00 12.00
     PSYC479  SPECIAL RES PROB         A  2.00  2.00  8.00
** Semester Academic Honors **
Semester:       Attempted 13.00; Earned 13.00; GPA 3.907
UG Cumulative:            99.00;        99.00;     3.750

Fall 2017
MAJOR: BIOLOGICAL SCIENCES       COLLEGE: COMP, MATH, & NAT SCI
Double Major: PSYCHOLOGY
     BSCI430  DEVELOPMENTAL BIOLOGY    B- 3.00  3.00  8.10
     BSCI440  MAMMALIAN PHYSIOLOGY     B  4.00  4.00 12.00
     BSOS448T TCHNG ASSTNT PRCTCM UNIV A  1.00  1.00  4.00
     ENGL395  WRITING FOR HEALTH PROF  A+ 3.00  3.00 12.00 FSPW
     PSYC341  INTRO MEM&COGNITION      A+ 3.00  3.00 12.00
Semester:       Attempted 14.00; Earned 14.00; GPA 3.435
UG Cumulative:           113.00;       113.00;     3.711

Spring 2018
MAJOR: BIOLOGICAL SCIENCES       COLLEGE: COMP, MATH, & NAT SCI
Double Degree: PSYCHOLOGY
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     BSCI361  PRINCIPLES OF ECOLOGY    A- 4.00  4.00 14.80
     BSCI446  NEURAL SYSTEMS           A  3.00  3.00 12.00
     EDSP470  INTRO SPECIAL EDUC       A+ 3.00  3.00 12.00 DVUP
     KNES157N WT TRAINING (BEG)        A  1.00  1.00  4.00
     PSYC433  BASIC HELPING SKILLS     A- 4.00  4.00 14.80
** Semester Academic Honors **
Semester:       Attempted 15.00; Earned 15.00; GPA 3.840
UG Cumulative:           128.00;       128.00;     3.726

** Degree Information **
COLLEGE OF BEHAVIORAL AND SOCIAL SCIENCE
Bachelor of Science
Awarded 05/20/18
PSYCHOLOGY

** Degree Information **
COLLEGE OF COMPUTER, MATH & NATURAL SCI
Bachelor of Science
Awarded 05/20/18
BIOLOGICAL SCIENCES
SPECIALIZATION:PHYSIOLOGY & NEUROBIOLOGY

UG Cumulative Credit: 152.00
UG Cumulative GPA   : 3.726
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WRITING SAMPLE

I was assigned to write the following bench memorandum during my 2020 summer internship with the Honorable Mary Ellen Barbera, Chief Judge of the Maryland Court of Appeals. The bench memorandum involved the question of whether the intermediate appellate court abused its discretion by upholding the trial court's decision to admit into evidence recorded rap lyrics performed by a defendant awaiting trial for second-degree murder.

This bench memorandum is my own work product, does not represent the opinion of any member of the Court, and received only non-substantive edits from the Judge's law clerks. I received permission to use this bench memorandum as my writing sample. All confidential information has been redacted. [Petitioner] and [victim] have replaced the names of the individuals involved in the case.

QUESTION PRESENTED

Petitioner presents the question as follows:

"Did the circuit court err in admitting a recording of inflammatory rap lyrics recited by [Petitioner] that were unrelated to the crime?"

BRIEF ANSWER

No. Under the inquiry set forth in *Hannah v. State*, 420 Md. 339, 348 (2011), rap lyrics are admissible as autobiographical statements of historical fact when they contain a strong factual nexus with the circumstances surrounding the crime the defendant is charged with, as opposed to merely suggesting the defendant's broad propensity for violence. Here, the trial court did not abuse its discretion because there was a sufficient factual nexus between the rap lyrics and crime committed.

FACTS AND PROCEDURAL HISTORY

On January 16, 2017, [victim] was shot during a drug deal after attempting to exchange counterfeit money for cocaine. *[Petitioner] v. State of Maryland*, Slip Op. at 1-2 (Filed Dec. 23, 2019) (citation omitted). [Victim] was subsequently taken to a hospital in an ambulance; he died shortly thereafter. *Id.* On January 18, [victim's] cousin identified [Petitioner] as the shooter in a photo array after being brought into police custody for an outstanding warrant related to a theft charge. *Id.* at 2. Around two weeks later, [Petitioner] was arrested in an Annapolis hotel for killing [victim]. *Id.* at 2. Over the course of his incarceration, [Petitioner] made numerous calls to individuals outside the detention center where he was staying. *Id.* at 2. Many of these calls were recorded. *Id.* at 2. On October 17, less than three weeks before the trial was set to begin, [Petitioner] recited a self-composed rap during one of the calls, which he intended to perform for his friend's Instagram. *Id.* at 2. This call was recorded by the detention center. *Id.* at 2-4.

At trial, the State put forward four (4) types of evidence to prove that [Petitioner] was the person who killed [victim]: (1) testimony from eyewitnesses identifying [Petitioner] as the killer and placing him at the scene of the crime, (2) forensic evidence suggesting the bullets used in the shooting came from .40-calliber casings, (3) video footage of the drug deal, and finally, (4) an approximately one minute excerpt from the October 17 phone recording. *Id.* at 2-3. The identity of [victim's] killer was the main issue for the jury to resolve at trial. Pet. Br. at 3; Resp. Br. at 24.

The phone recording contained [Petitioner's] self-composed rap as well as snippets of the surrounding conversation. E000075-E000079. The State asserted [Petitioner] confessed to killing [victim] in the rap lyrics. *See* Slip Op. at 5. [Petitioner] unsuccessfully objected to introducing the recording into evidence on admissibility grounds. *Id.* at 4. The circuit judge noted that the probative value of the lyrics could be argued either way, and thus allowed the evidence to be presented to the jury. E000090-E0000091. The lyrics (and surrounding conversation) are as follows:

> [Petitioner]: I'm going to the booth tomorrow . . .
> Friend: My n---a, it's going on my Instagram so you're on live with me right now . . .
>
> [Petitioner]:
> Y.S.K. / I always let it spray / And, if a n---a' ever play /
> Treat his head like a target / You know he's dead today /
> Do his ass like a Navy Seal /
> My n----s we ain't never squeal, /
> I'll pop your top like an orange peel /
> You know I'm from the streets / F.T.G. / you know the gutter is me /
> Cause I'll be always repping my Y.S.K. shit, / Cause I'm the King / I'll be playin' the block bitch/
> And if you ever play with me/ I'll give you a dream a couple shots snitch /
> It's like hockey pucks the way I dish out this/
> There's a .40 when this bitch goin' hit up shit/ 4 or 5 rip up your body quick/
> Like a pickup truck /But you ain't getting picked up/
> You getting picked up by the ambulance / You could be dead on the spot / I'll be on your ass.
>
> Friend:
> Stop rapping like that, b---h.

> [Petitioner]:
> I'm Gucci. It's a rap. F--k they can do for – about a rap? . . . What y'all watching? Michigan and Michigan State?

[Petitioner] did not present any evidence at trial. Slip Op. at 3. A jury in the circuit court convicted [Petitioner] with murder in the second degree, assault in the first degree, use of a firearm in a crime of violence, use of a firearm in the commission of a felony, and wearing, carrying, and transporting a handgun on or about the person. *Id.* [Petitioner] moved for a new trial on the grounds that the rap lyrics were improperly admitted as evidence. E000353-E000372.

COURT OF SPECIAL APPEALS DECISION

The Court of Special Appeals ("COSA") held that the pretrial recording of rap lyrics between [Petitioner] and a friend were properly admitted. COSA concluded that the circuit court correctly admitted the recording of the rap lyrics because the probative value of the rap lyrics was not substantially outweighed by the danger of unfair prejudice.

COSA first provided the background statutory law pertaining to relevancy and admissibility of evidence. Slip Op. at 5. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. However, relevancy is not the sole inquiry for whether evidence is admissible. Slip Op. at 5. Additionally, trial courts use a balancing test, weighing the probative value of the evidence versus the danger of unfair prejudice the evidence may pose to the defendant. Md. Rule 5-403. When the unfair prejudice introduced by the evidence substantially outweighs its probative value, the evidence is not admissible. *Id.* Evidence is unfairly prejudicial "when it tends to have some adverse effect beyond tending to prove the fact or issue that justified its admission." Slip Op. at 5 (quoting *Hannah*, 420 Md. at 347).

COSA next examined the case law which shapes how courts analyze rap lyrics in the context of admissibility. COSA noted that there is only one reported case in Maryland pertaining to the admissibility of rap lyrics, so it is necessary to analyze cases outside of this jurisdiction. Slip Op. at 6 (citing *Hannah*, 420 Md. at 339). COSA explained that rap lyrics are particularly susceptible to unfairly prejudicing defendants because there is a societal divide in how people perceive rap. *Id.* at 12. Although some "view [rap] as art . . . other[s] view [rap] as . . . descriptive of a mean-spirited culture, risk[ing] poisoning the jury against the defendant." *State v. Skinner*, 95 A.3d 236, 238 (N.J. 2014). Accordingly, rap lyrics have a baseline of "unfair prejudicial impact as evidence of [the defendant's] bad character." *See State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001).

Therefore, when rap lyrics merely contain "general references glorifying violence," they are inadmissible. *Id.* (cleaned up). Although the rap lyrics may be relevant, they are insufficiently probative to overcome their unfair prejudicial nature to be admissible under Maryland 5-403. Slip Op. at 12-13. However, when rap lyrics contain a "strong nexus" to "the circumstances of the offense for which the evidence is being adduced," their probative value increases because the lyrics serve as "direct proof" of the defendant's criminal conduct. *Id.* at 13 (citing *Skinner*, 95 A.3d at 249 n.5, 251-52; *see e.g.*, *Greene v. Commonwealth*, 197 S.W.3d 76, 86-87 (Ky. 2006)). COSA also suggested that when rap lyrics are created or recited close in time to the criminal conduct, this timeliness likewise increases their probative value. *Id.* at 13. COSA emphasized that even though rap lyrics often embellish and involve abstract references, this fact does not exempt the rap lyrics from being probative merely because they are conveyed via an artistic medium. *Id.* at 13 (citing *Skinner*, 95 A.3d at 249 n.5).

Next, COSA explained how the doctrine proffered by other jurisdictions is consistent with the only case this Court has decided pertaining to the admissibility of rap lyrics, *Hannah*. This Court follows the same basic framework as other jurisdictions: lyrics are either "admissible statements of historical facts, [or] rather inadmissible works of fiction." *Hannah*, 420 Md. at 348. The former sufficiently overlap with the evidence of the crime and are sufficiently probative to survive Maryland 5-403. *See* Slip Op. 14-15. The latter fail under Maryland 5-403 because they are too general (and therefore insufficiently probative) to overcome their unfair prejudicial nature, and thus their "value as impeachment evidence was not worth the costs they exacted as bad-character evidence." *Id.* at 15. In *Hannah*, the defendant had been charged with and convicted of attempted murder. 420 Md. at 340. The State introduced rap lyrics into evidence in order to impeach the defendant's claim that he had no interest in guns. *Id.* at 342-43. This Court ruled that the rap lyrics did not meet the threshold of an admissible autobiographical statement of historical fact because they "were probative of no issue other than the issue of whether he has a propensity for violence." *Id.* at 355.

COSA concluded that [Petitioner's] rap lyrics were relevant under Maryland 5-401 and admissible under Maryland 5-403. *Id.* at 15-16. The rap lyrics were relevant because, by alluding to details of the crime and explaining [Petitioner's] possible motive for the murder, they made it more probable [Petitioner] was [victim's] killer. *Id.* at 16. The rap lyrics survived Maryland 5-403 because there was a strong nexus between [Petitioner's] rap lyrics and the circumstances of [victim's] murder; the lyrics provided insight into "exactly what happened" to [victim] the night he was killed. *Id.* at 15-16. Moreover, the lyrics were temporally proximate to [victim's] murder, further strengthening their probative value. *Id.* at 15-16. To sum, the trial court correctly admitted

the rap lyrics into evidence despite the unfair prejudice they may carry because they were probative enough to satisfy Maryland 5-403; the lyrics were worth their costs. *Id.* at 16.

PARTIES' ARGUMENTS

A. Petitioner's Arguments

[Petitioner] contends that courts should be hesitant to admit rap lyrics as evidence because rap lyrics tend to be ambiguous and unfairly prejudicial. Accordingly, [Petitioner] posits that courts should only admit rap lyrics when there is an "unmistakable factual connection" between the rap lyrics and the facts of the case. Pet. Br. at 15 (citing *Skinner*, 95 A.3d at 252).

[Petitioner] first argues that COSA failed to recognize that courts must exercise a "special caution" when deciding whether rap lyrics are relevant and admissible as evidence. *Id.* at 11. [Petitioner] asserts that this Court in *Hannah* held rap lyrics deserve this distinct treatment because they are forms of artistic expression which require a nuanced understanding and unbiased perception to properly assess their admissibility. *Id.* at 11. Specifically, courts must acknowledge that rap lyrics are "neither inherently truthful, accurate, self-referential depictions of events, nor necessarily representative of an individual's mindset." *Id.* at 11 (citing Andrea Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal* Evidence, 31 Colum. J.L. & Arts 1, 4 (2007)). Thus, [Petitioner] explains that under this Court's precedent, rap lyrics fall into two distinct categories: "inadmissible works of fiction and admissible statements of fact." *Id.* at 11 (citing *Hannah*, 420 Md. at 348). In order for rap lyrics to make the jump from inadmissible works of fiction to an admissible statement of fact, there must be a "strong nexus" between the specific details of the rap lyrics and circumstances of the offense. *Id.* at 11 (citing *Skinner*, 95 A.3d 236).

Applying these principles to [Petitioner's] pretrial rap recording, there was not a sufficient nexus between the rap lyrics and the circumstances of the case to meet the threshold of admissible

statements of fact. *Id.* at 11-12. [Petitioner] first focuses on the rap lyrics in the context of the phone conversation in which they took place. *Id.* at 11-12. [Petitioner] argues that it is "clear that the intention is to perform fictional rap lyrics" because [Petitioner] stated he was "going to the booth" (meaning he was going to a recording studio) before starting to rap over the phone so that the rap could be posted to Instagram. *Id.* at 12. Thus, all of the rap lyrics should be construed as fiction rather than autobiographical fact because it was impossible to go to a recording studio—[Petitioner] was incarcerated and would continue to be incarcerated. *See id.* at 12.

Next, [Petitioner] explains that rap lyrics generally contain exaggerations and hyperbolic language. *Id.* at 12-13. [Petitioner] points to both studies and examples of rap music which suggest that a common motif in rap is discussing gun homicides as a mechanism for retribution. *Id.* at 12-13 n. 3-5. According to [Petitioner], the rap lyrics were simply generic lines that fit in the overall mold of the rap genre, and thus COSA, by taking the lyrics out of their original context, misconstrued them. *Id.* at 13. To sum, [Petitioner] asserts that as a preliminary measure, COSA erred by not treating rap lyrics with a distinct precaution before analyzing them for relevancy and admissibility.

[Petitioner's] second argument posits that the rap lyrics were not relevant because they did not make the identity of [victim's] murderer more or less probable. *Id.* at 13. Evidence is irrelevant under Maryland 5-401 when it is "too ambiguous and equivocal," and at best invites the "jury to speculate." *Id.* at 13 (quoting *Thomas*, 372 Md. 342, 355 (2002); *Snyder v. State*, 361 Md. 580, 596 (2000)). To overcome this ambiguity, there must be a discernible, clear connection between the potential evidence and the facts of the case. *See id.* at 13.

[Petitioner] asserts the rap lyrics were too ambiguous because they were susceptible to various interpretations. *Id.* at 14. For example, the "forty" that [Petitioner] referenced could be

either a .40-caliber bullet or a 40-ounce of malt liquor. *Id.* at 14. And, even if [Petitioner] was referencing a .40-caliber bullet, these are one of the most common weapons used in shootings. *Id.* at 14. Accordingly, because the rap lyrics are rife with these ambiguous phrases, the lyrics as a whole do not have the tendency to make it more or less likely [Petitioner] murdered [victim]. *Id.* at 14-15.

Finally, [Petitioner] asserts that assuming arguendo the rap lyrics are relevant, the probative value of the lyrics is outweighed by their highly prejudicial impact. *Id.* at 15. Rap lyrics are only admissible when the "utility" they provide to the jurors' evaluation of the case is not substantially outweighed by their "inflammatory character." *Id.* at 15 (citing *Smith*, 218 Md. App. 689, 705). For rap lyrics to reach this threshold, they are required to contain an "unmistakable factual connection to the charged crimes." *Id.* at 15 (citing *Skinner*, 95 A.3d at 252); *see also United States v. Johnson*, No. S5 16 CR. 281 (PGG), 2019 WL 690338, at *18 (S.D.N.Y. Feb 16, 2019) (finding lyrics inadmissible where they did not contain direct references to gang activity or affiliation).

[Petitioner] articulates two sets of cases to illustrate how the factual connection between rap lyrics and the circumstances of the crime dictate their admissibility. *Id.* at 16-17. In *Hannah*, this Court found that to be admissible, rap lyrics must be more probative than merely suggesting the defendant's "propensity for violence" to overcome their inherently inflammatory nature. 420 Md. at 355. [Petitioner] also points to *Cheeseboro*, which this Court used in its discussion in *Hannah*. 552 S.E. 2d at 313. The *Cheeseboro* court held that when rap lyrics are "too vague in context . . . the minimal probative value is far outweighed by its unfair prejudicial impact as evidence of . . . [the defendant's] propensity for violence in general." *Id.* [Petitioner] compares *Hannah* and *Cheeseboro* to cases where courts did find it proper to admit rap lyrics as evidence. Pet. Br. at 17-18 (citing *Holmes v. State*, 306 P.3d 415, 419-420 (Nev. 2013); *Greene*, 197 S.W.3d

76, 86-87). For example, in *Holmes v. State*, the court upheld the admission of rap lyrics referencing minute details of a crime, such as the murderer's use of a ski mask and stealing a necklace. 306 P.3d at 419. [Petitioner] asserts these lyrics were admissible only because they were satisfactorily "specific and unique" to the crime in question, providing enough utility to overcome the inflammatory nature of the lyrics. Pet. Br. at 18.

[Petitioner] argues that this case more aligns with *Hannah* and *Cheeseboro* than *Holmes*. *Id.* at 18. [Petitioner's] argument that there is not a sufficient factual connection between the lyrics of the rap recording and the details of the alleged crime is twofold. *Id.* at 18. First, [Petitioner's] rap lyrics do not allude to core details of [victim's] murder; for example, drugs played a huge part in the circumstances surrounding [victim's] murder, but were not mentioned in the rap. *Id.* at 18. Second, the lyrics of the rap were merely vague, generic references typical of the rap genre. *Id.* at 18. [Petitioner] explains that to hold these rap lyrics as having the threshold level of factual connection would implicate [Petitioner] as a suspect in all shooting crimes in Maryland because the lyrics are so broad. *Id.* at 18. Accordingly, [Petitioner] argues that admitting these rap lyrics does nothing but suggest a propensity for violence, which is prejudicial. *Id.* at 18-19.

[Petitioner] invokes the same reasoning when analyzing COSA's review of the circuit court, which held there was a "patent factual connection" between the rap lyrics and circumstances of [victim's] death. *Id.* at 19 (citing Slip Op. at 16). Again, [Petitioner] points to the rap lyrics general vagueness and inconsistencies between the rap lyrics and circumstances surrounding [victim's] murder (*e.g.*, [Petitioner] addresses the rap lyrics to a "snitch," but no evidence suggests [victim] was an informant). *Id.* at 19. [Petitioner] also counters COSA's emphasis on the temporal proximity between the rap lyrics and the details of [victim's] murder. *Id.* at 20. While the case law does note that lyrics written after the alleged crime strengthen their utility, this temporal proximity

only strengthens the lyrics utility when the rap lyrics are sufficiently relevant. *Id.* at 20. When the lyrics on the other hand are vague, their temporal proximity is of no significance. *Id.* at 20.

Finally, [Petitioner] highlights the prejudice caused by introducing the lyrics. *Id.* at 20-21. [Petitioner] asserts that introducing the rap lyrics was particularly damning here because the rest of the evidence that the State put forward was so unreliable—the eyewitness testimony was from an untrustworthy witness and there was little supplementary forensic evidence. *Id.* at 20. Therefore, because the rap lyrics are inflammatory, they cast [Petitioner] in a negative light without any merit of connecting him to the case. *Id.* at 20-21. The rap lyrics were unfairly prejudicial, substantially outweighing their probative value. *Id.* at 20-21.

[Petitioner] proffers a new argument in his reply brief that introducing rap lyrics may unfairly prejudice African Americans more than other races. Reply Br. at 18-19 (citing Donald F. Tibbs & Shelley Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 Wash. U.J.L. & Pol'y 33, 65 (2016). [Petitioner] reasons that "the image rappers project is one that maps perfectly to the stereotypes about black men." *Id.* (quoting Erik Nielson & Andrea L. Dennis, *Rap on Trial: Lyrics, and Guilt in American* (2019). This can sway a jurors' perception that the lyrics are something more sinister rather than artistic creations. *Id.*

B. Respondent's Arguments (the State)

The State argues that the trial court properly admitted [Petitioner's] pretrial rap recording into evidence because the rap lyrics could be interpreted as an admission, in line with traditional Maryland evidence doctrine.

First, the State argues [Petitioner's] insistence that COSA should have exercised the "appropriate precautions" when analyzing the rap lyrics is unfounded. *Id.* at 21. Although evidence

contained within artistic expressions may have the potential to unfairly prejudice defendants, the traditional canons of evidence law mediate the balance between probative value and prejudice. *Id.* at 21 (citing *Hannah*, 420 Md. at 362) (Harrell J., concurring).

The State then explains the underlying statutory and case law pertaining to relevance. *Id.* at 24-26. "Relevant evidence" is defined as evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Md. Rule 5-401. Moreover, this Court has held relevance "is a very low bar to meet." *Williams v. State*, 457 Md. 551, 564 (2018). Accordingly, the threshold question for this Court to decide is whether [Petitioner's] pretrial rap recording had "*any* tendency" (no matter how small) to make the fact that [Petitioner] was [victim's] killer any more or less probable. Resp. Br. at 26 (emphasis in original). The State notes that relevancy inquiries (including whether the threshold of Maryland 5-401 is satisfied) are not made "in a vacuum," but rather must take into account whether, "in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable" *Id.* at 25 (quoting *Snyder*, 361 Md. at 591; citing *Smith v. State*, 423 Md. 573, 591 (2011) (citations omitted)). Last, it is important to note that the relevance of the defendant's lyrics was not at issue in *Hannah*. Instead, this Court was focusing on the issue of the scope of permissible cross-examination. Resp. Br. at 26.

Next, the State shows how this statutory law has been applied in cases analyzing the relevance of rap lyrics, but first emphasizes two controlling principles that courts use when doing so. First, the context in which rap lyrics occur is the principle which guides how courts frame this doctrine. *Id.* at 27. The typical relevancy objection to rap lyrics is that the lyrics simply do not mean what they say—rap lyrics involve "abstract representations of events or ubiquitous

storylines." *Id.* at 27 (citing *Holmes*, 306 P.3d at 419 (citations omitted)). However, by examining the rap lyrics in the context in which they were recited or created, this inquiry can clarify their meaning. *Id.* at 27. Additionally, while rap lyrics can be subject to multiple reasonable interpretations, such as describing details of a crime versus being an artistic expression, that interpretation "only affects the weight of the evidence, not its admissibility." *Id.* at 27 (quoting *United State v. Recio*, 884 F.3d 230, 236 (4th Cir. 2018). The burden of assigning weight to evidence is put on the jurors. *Id.* at 27 (citing *Holmes*, 306 P.3d at 419 (citations omitted).

For example, in *Holmes*, the Nevada Supreme Court held that rap lyrics were relevant for two reasons: the lyrics mirrored the details of the circumstances of the crime, and also were composed after the alleged crime took place. 306 P.3d at 420. The State compared *Holmes* to *Skinner*,[1] in which the court held that general rap lyrics written "long before" a shooting took place could not make it more or less probable that the defendant was the shooter because there was no "logical connection" between the lyrics and the shooting. 95 A.3d at 246. Moreover, the lengthy gap in time diluted whatever probative value the lyrics offered. *Id.* Thus, the State asserts the guiding principle when analyzing the relevancy of rap lyrics is context. Resp. Br. at 28. Rap lyrics by themselves, no matter how specific, are irrelevant. *See Skinner*, 95 A.3d at 252. ("[o]ne would not presume that Bob Marley . . . actually shot a sheriff[.]"). However, rap lyrics can be relevant depending on their context, which requires analyzing the factual connection between the rap lyrics and alleged crime, as well as their temporal proximity to the crime. Resp. Br. at 28-29. If Bob Marley had been connected to a crime which involved shooting a sheriff, it is very likely that his

[1] The State asserts that Maryland courts should be wary of the language used in *Skinner* because the high threshold that court proffered is "fundamentally at odds" with the low bar of admissibility required by Maryland Rule 5-401. Resp. Br. at 47 n. 10.

song (if recited close in time to the shooting) would have been admissible as evidence because it could be reasonably construed as an admission to the crime. *Id.* at 29.

The State then applies this principle to [Petitioner's] self-composed rap lyrics, pointing to three different features of the surrounding context to show that [Petitioner's] rap lyrics are relevant. *Id.* at 30-33. First, the State highlights that [Petitioner] recited the rap lyrics *after* [victim] was murdered and three weeks before the trial was set to occur. *Id.* at 30. Second, various other forms of evidence—including testimony that [victim] left the Woodside Apartments complex in an ambulance, the introduction of the two .40-caliber bullet casings, and witness identification of [Petitioner]—were already presented at the trial before the rap lyrics were introduced. *Id.* at 30. The State asserts that the otherwise obscure rap lyrics, when in this context align with the circumstances of [victim's] murder. *Id.* at 30. Finally, [Petitioner] stopped reciting the rap lyrics after the person he was speaking to warned him that he should refrain from doing so, indicating that [Petitioner] realized he was potentially admitting to killing [victim]. *Id.* at 31. Accordingly, analyzing the rap lyrics in conjunction with the surrounding context, the rap lyrics are relevant because they at least had slight tendency to make it more probable [Petitioner] murdered [victim]. *Id.* at 31.

Next, the State counters various propositions that [Petitioner] put forward as to why the lyrics are not relevant. First, [Petitioner's] reliance on *Thomas* and *Snyder* is misplaced—these cases, while superficially similar did not address the issue at hand or an analogous issue. Resp. Br. at 32. Instead, these cases analyzed "consciousness of guilt" evidence, rather than admissions of guilt. *Id.* Next, the State counters [Petitioner's] assertion that rap lyrics must be specific (*i.e.*, not general) to be relevant. *Id.* at 33 (citing *Holmes*, 306 P.3d at 420 ("The lyrics' lack of originality may reduce but does not eliminate their probative value.")). Again, the proper inquiry is context.

Id. at 33. While [Petitioner's] rap lyrics alone do not make it more probable that [Petitioner] killed [victim], when examined alongside the other evidence and [Petitioner's] reaction when told to stop rapping, a jury could reasonably interpret the lyrics to be an admission. The State highlights that the lyrics mirror specific details of the crime and in context they make it more probable that [Petitioner] was [victim's] killer. *Id.* at 33. Just because the lyrics could also be interpreted in another way (*i.e.*, as "fictional artistic expression"), evidence (in conjunction with other evidence) need only indicate a fact is "slightly more probable than it would appear without the evidence." *Id.* at 34 (citing *Smith*, 423 Md. at 591).

The State next argues the probative value of the rap lyrics was not substantially outweighed by the danger of unfair prejudice, and thus satisfy Maryland 5-403. *Id.* at 35. The State distinguishes between prejudice, which "hurts" a party's case, and unfair prejudice, which evokes an illogical (most often emotional) response in the juror. *Id.* at 36 (citing *Old Chief v. United* States, 519 U.S. 172, 180 (1997)). Moreover, relevant evidence will only be excluded when unfair prejudice "substantially outweighs" its probative value. *Id.* at 36. "Probative value is outweighed by the danger of 'unfair' prejudice when the evidence precludes such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case." *Newman*, 236 Md. App. 533, 550 (quoting Joseph F. Murphy, Jr., Maryland Evidence Handbook (3d ed., 1999), § 506(B) at 181). This language puts the thumb on the scale for admissibility. *See id.* at 36.

The State asserts that [Petitioner] has simply not met the burden this Court has held a moving party must meet to show why evidence is inadmissible under Maryland 5-403: an objecting party "must make the grounds for a different ruling manifest in the trial court." *Id.* at 37. (citing *Peterson v. State*, 444 Md. 105, 125 (2015)). Instead, the State suggests that [Petitioner] cites to cases without analogizing their reasoning to the facts of his case and improperly reiterates

objections to eyewitness testimony. *Id.* at 37-38. Therefore, [Petitioner] has not met the burden of showing why the trial court abused its discretion. *Id.* at 38.

The State counters [Petitioner's] reliance on the case law, arguing that the cases he cites are factually distinct and thus inapposite. *Id.* at 38 (distinguishing *United States v. Mills*, 367 F. Supp. 3d 664, 672 (E.D. Mich. 2019); *People v. Johnson*, 32 Cal. App. 5th 26, 62 (2019)). The State next distinguishes *Cheeseboro*. 552 S.E.2d at 300. In *Cheeseboro*, the South Carolina Supreme Court reversed the trial court's decision to admit rap lyrics, even though the rap lyrics overlapped with the circumstances of the murder of which Cheeseboro was charged.[2] *Id.* The court held that because the lyrics were so vague, they were not probative enough to counter the unfair prejudicial impact they imposed on Cheeseboro. *Id.* In this case, the State asserts that [Petitioner's] rap lyrics were much more specific—[Petitioner] referenced the exact weapon (.40-calliber bullet casings) and circumstances (being "played," which is potentially synonymous to being given counterfeit money) surrounding [victim's] death. Resp. Br. at 41. Therefore, this specificity, in conjunction with [Petitioner's] friend telling him to "stop" rapping, offer much more probative value than Cheeseboro's lyrics. *Id.*

Furthermore, the State emphasizes that *Cheeseboro* was decided over twenty years ago, which is important because society's perception of rap has evolved. *Id.* Citing various cases and studies, the State suggests that rap lyrics do not necessarily invite the same unfair prejudice they used to. *Id.* For example, the Sixth Circuit held that "reasonable jurors would be unlikely to reason that a rapper is violent *simply because he raps about violence*." Resp. Br. at 42 (quoting *United States v. Stuckey*, 253 Fed. Appx. 468, 484 (6th Cir. 2007) (emphasis in original)). Likewise,

[2] Cheeseboro referenced a "blood pool" in self-composed rap lyrics that he recited while incarcerated for allegedly shooting the owners of a barber shop.

academic research has suggested that introducing rap lyrics as evidence may not necessarily "allow the government to obtain a stranglehold on the case[.]" *Id.* at 44 (citing Adam Dunbar, *Art or Confession?: Evaluating Rap Lyrics as Evidence in Criminal Cases*) (citations omitted). Although it used to be the case that "rap lyrics exerted significant prejudicial impact on the evaluation of a person, and particularly so when the person has been accused of murder," this prejudicial impact may have subsided. *Id.* at 43 (Dennis *supra*, at 28 n. 169 (citations omitted)). In other words, jurors may now be able to better analyze rap lyrics as evidence without an inherent unfair prejudicial bias. *Id.* at 45.

The State next explains that when appellate courts reverse trial courts' decisions to admit defendant composed rap lyrics, they take into account both the content of the lyrics as well as *how* the lyrics were used. *Id.* at 45. In *Hannah*, this Court held that it was improper to admit a series of ten rap lyrics written years prior to Hannah's alleged involvement in a drive-by shooting. 420, Md. at 355. The Court excluded the lyrics because they were "probative of no issues other than the issue of whether he has a propensity for violence" and were used for the "sole purpose of impeaching [Hannah's] claim that he had 'no interest' in guns." *Id.* at 344, 355. Likewise, in *Skinner*, the New Jersey Supreme Court held that it was improper to allow a witness to recite thirteen pages of the defendant's rap lyrics because the lyrics' sole evidentiary purpose was to prove the defendant's propensity towards violence. 95 N.J. at 251. Lastly, the State highlighted *Gamory*, where the Eleventh Circuit reversed the district court's decision to admit a rap music video referencing drugs (among various other things) in a case where Gamory was charged with money laundering and conspiring to possess cocaine. 635 F.3d 480, 485 (11th Cir. 2011). The prosecution introduced the rap music video—produced by the defendant's music studio—to show a "correlation" between the defendant and drug money. *Id.* at 488. The *Gamory* court held that the

minor tendency of the music video to establish that Gamory was the owner of the music studio was of minimal probative value, which was substantially outweighed by the unfair prejudice that the music video brought upon the defendant. *Id.* at 493.

The State then distinguished [Petitioner's] rap lyrics from the aforementioned cases, Resp. Br. at 50. Here, the rap lyrics were contained within a one-minute recording and were recited after [victim's] murder. *Id.* at 50. The lyrics thus could reasonably be interpreted as [Petitioner] admitting to the specific crime at issue, rather than merely indicating [Petitioner's] broad propensity for violence or a general connection to the subject of the crime like in *Hannah*, *Skinner*, and *Gamory*. *Id.* at 50. Therefore, this case is much more like *Holmes*, where the Nevada Supreme Court held that the introduction of rap lyrics was proper when the trial court admitted "only a single stanza . . . that . . . relayed facts quite similar to the crime charged." 306, P.3d at 420. Thus, in this case the jury had a straightforward "fact-finding mission" to determine if the rap lyrics were [Petitioner's] admission or merely a creative expression, rather than making an abstract connection between the rap lyrics and the purpose they were being admitted for. Resp. Br. at 51.

The State concludes by emphasizing the underlying theme when introducing rap lyrics is reasonableness. Resp. Br. at 52 (citing *Hannah*, 420 Md. at 362 (Harrel J., concurring)). Because [Petitioner's] rap lyrics could reasonably be interpreted as an admission, the trial court did not abuse its discretion by admitting the lyrics. *Id.*

DISCUSSION

COSA correctly held the circuit court properly admitted [Petitioner's] pretrial rap recording into evidence. In the context of all of the evidence presented,[3] introducing the rap lyrics made it

[3] It is important to emphasize that relevancy inquiries are made relative to all evidence put forward by the parties: "As long as the *collective impact of all the evidence* introduced is sufficient to prove the proponent's case by the applicable standard of proof, that is all that is

more probable that [Petitioner] killed [victim], and also offered enough probative value to sufficiently counter the unfair prejudice that the rap lyrics could have caused [Petitioner].

1. Admissibility

In *Hannah*, this Court applied Maryland Rules 5-401 and 5-403 to rap lyrics, setting forth a binary standard: defendant composed rap lyrics can either be "admissible statements of historical fact . . . [or] inadmissible works of fiction." 420 Md. at 349. In *Hannah*, the issue at trial was whether Hannah was the person who attempted to murder his ex-girlfriend with a gun. *Id.* at 341-42. At trial, the State introduced ten violent rap lyrics that Hannah had written two years prior to the circumstances of the crime. *Id.* at 345. The rap lyrics were used to impeach Hannah's assertion that he had "no interest in guns." *Id.* at 344. This Court reversed the trial court's decision to admit the rap lyrics into evidence because they did not contain any factual overlap with the circumstances surrounding the attempted murder of Hannah's ex-girlfriend. *See id.* at 355. Although the rap lyrics were relevant because they indicated Hannah may have had an interest in guns, and thus technically made it slightly more probable Hannah was the shooter, they were held to be inadmissible works of fiction. Md. Rule 5-401; *Hannah*, 420 Md. at 355. The lyrics were inadmissible because in the context of all of the evidence presented and substantial gap in time between the rap lyrics creation and circumstances of the crime, they "were probative of no issue other than the issue of whether [Hannah] ha[d] a propensity for violence." *See Hannah*, 420 Md. at 355 (citing *Cheeseboro*, 552 S.E. 2d at 313)). The rap lyrics' marginal probative value was substantially outweighed by the danger of unfair prejudice because they potentially casted Hannah in a negative, violent light,

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required." (emphasis added). HON. PAUL W. GRIMM & MATTHEW G. HJORTSBERG, FUNDAMENTALS OF TRIAL EVIDENCE: STATE AND FEDERAL 19 (1997).

which could illogically sway the jury's decision based on their perception of Hannah's character rather than the facts of the case. Md. Rule 5-403; *see Hannah*, 420 Md. at 355.

While *Hannah* did not articulate what constitutes "admissible statements of fact," the Court did survey other decisions which found rap lyrics to be properly admitted. *Id.* at 348-349. The Kentucky Supreme Court held that rap lyrics recited in a defendant-produced video montage were sufficiently probative to counter the danger of unfair prejudice because "the video refers to Appellant's actions and emotions regarding this crime, not a previous offense . . . and . . . the video establishes premeditation and motive in Appellant's own words." *Id.* at 348 (quoting *Greene*, 197 S.W.3d at 87). Put simply, the rap lyrics were admissible statements of fact because they significantly overlapped with the circumstances surrounding the crime Greene was charged with. *See id.* at 348 (citing *Greene*, 197 S.W.3d at 87).

The State persuasively argues this Court should not follow the "cautionary approach" for admitting rap lyrics as evidence purported by [Petitioner]. Their reasoning is twofold: first, there is no basis in *Hannah*, nor cases from any jurisdiction for this proposition; second, Maryland evidence doctrine mediates the concerns that introducing rap lyrics poses to defendants. Like all potentially inflammatory evidence, Maryland Rule 5-403's balancing test, as illustrated in *Hannah*, provides trial courts with a mechanism to exclude unfairly prejudicial evidence.

2. The Circuit Court Did Not Abuse Its Discretion in Admitting the Pretrial Rap Recording.

This case is similar to *Holmes*, 306 P.3d at 415. In *Holmes*, the Nevada Supreme Court upheld the lower court's decision to admit defendant-composed rap lyrics into evidence. *Id.* at 419. Other evidence suggested the defendant—charged with robbery and murder—wore a mask, turned the victim's pockets inside-out, stole a necklace from the victim and took place in a parking lot. *Id.* at 417. The rap lyrics, composed and recited after the robbery and murder while the defendant

was awaiting trial for an unrelated crime, referenced these specific events. *Id.* at 419. Accordingly, the Nevada Supreme Court upheld the trial court's decision because the rap lyrics "incorporate[d] details of the crime charged" rather than merely indicating the defendant had a "propensity for violence." *Id.* at 419. Additionally, "the timing of the composition after Holmes's arrest" contributed to its probative value because they were recited after the crime. *See id.* at 420. By holding that the rap lyrics were sufficiently probative to have been properly admitted, the Nevada Supreme Court implicitly acknowledged the rap lyrics were relevant.

While the overlap between [Petitioner's] rap lyrics and the circumstances surrounding [victim's] murder is not as thorough as the overlap in *Holmes*, there still is a strong nexus connecting the two.[4] [Petitioner] states in his rap that "If you ever play with me, I'll give you a dream couple shots snitch."[5] [Petitioner] also referenced a "forty," the snitch getting "picked up by the ambulance," and "death." When examining these rap lyrics in conjunction with testimony identifying [Petitioner] as [victim's] killer, forensic evidence identifying .40-caliber bullet casings, and the fact that an ambulance transported [victim] to a hospital where he died, the rap lyrics are substantially probative of identifying [Petitioner] as [victim's] killer because the rap lyrics parallel the circumstances of [victim's] murder. The rap lyrics could be construed by the jury to be referring to [Petitioner's] "actions and emotions regarding this crime . . . and . . . establish[] motive in [Petitioner's] own words." *Hannah*, 420 Md. at 348 (quoting *Greene*, 197 S.W.3d at 87).

[4] There are indeed some inconsistencies between [Petitioner's] rap lyrics and the details surrounding [victim's] murder. [Petitioner] alludes to shooting somebody's head ("I'll pop your top"), references a "truck" ([Petitioner's] car was technically an SUV), and also seems to recite the rap to a "snitch;" no evidence suggests that [victim] was an informant. These differences lower the lyrics' probative value.

[5] [Victim] used a counterfeit bill to pay for the cocaine which could be construed as "playing" the drug dealer.

Additionally, [Petitioner] abruptly changing the topic of conversation after being warned to stop rapping further indicates [Petitioner] could have been rapping about the details of [victim's] death because he realized his mistake of potentially admitting to the murder over a recorded line. Again, similar to *Holmes*, [Petitioner] recited his lyrics after [victim's] murder, making it more likely that [Petitioner] was referencing the circumstances surrounding [victim's] murder, further strengthening their probative value. In the words of COSA, the rap lyrics are worth their (arguably significant) costs. *See* Slip Op. at 16.

Although the rap lyric that mentions a "forty" could be interpreted as a forty-ounce of malt liquor rather than a .40-calliber bullet, this double entendre is of minimal consequence in the context of admissibility. As the State notes, the fact that the rap lyrics can be interpreted in multiple ways affects the weight of the evidence, which is determined by the jury. The Nevada Supreme Court likewise rejected this assertion in *Holmes,* because the lyrics "lack of originality" only "reduce[s] but does not eliminate their probative value." 306 P.3d at 420. It is illogical to preclude evidence if it is susceptible to multiple interpretations; nearly all evidence can be interpreted in various ways. Instead, the inquiry here is whether the rap lyrics offer sufficient probative value in order to be admitted as evidence to the jury.

The Nevada Supreme Court also rejected Holmes' assertions of substantial unfair prejudice. The court suggested that rap is better understood by today's society as a form of creative expression, and thus may not pose the same amount of unfair prejudice that it used to because it is "no longer an underground phenomenon." *Id.* at 419 (citing *Stuckey*, 253 Fed. Appx. at 484). In this case, the logic of the *Holmes* court is applicable. Rap is better understood by modern society in Maryland as it becomes more culturally mainstream, just like in Nevada. Although rap lyrics may still pose some danger of unfair prejudice, whatever illogical response rap lyrics do elicit in

today's jurors is likely less than before.

[Petitioner's] argument that his case aligns with *Cheeseboro* is on its face strong, but ultimately unpersuasive. In *Cheeseboro*, just like in this case, there was some factual overlap between the rap lyrics and circumstances surrounding the crime, as well as comparable additional evidence. 552 S.E. 2d at 305, 312-13. However, after analyzing the rap lyrics in context, it is clear that they did not sufficiently overlap with the circumstances of the crime. In *Cheeseboro*, the factual overlap was contained in only one (at most three) out of fourteen lyrics of the song. *Id.* at 312. Accordingly, the *Cheeseboro* court ruled the lyrics were inadmissible because the factual overlap was so small that the rap lyrics as a whole were "too vague in context" to be sufficiently probative. *Id.* at 313. Contrary, six out of twelve of [Petitioner's] rap lyrics overlap with the circumstances surrounding [victim's] death.[6] [Petitioner's] rap lyrics are simply more probative of the proposition they are being used for than the rap lyrics in *Cheeseboro*.

To sum, COSA correctly held the circuit court properly admitted the rap lyrics into evidence. [Petitioner's] rap lyrics were used for more than "evidence of bad character." Slip Op. at 16. Instead, they "alluded to details of the crime and explained [Petitioner's] possible motive for the murder." *Id.* Therefore, the rap lyrics satisfied *Hannah*, and thus were "admissible statements of historical fact." *Id.* While the rap lyrics may have invited unfair prejudice, they provided sufficient probative value because they were strong evidence as to "why the defendant was the person who committed the particular crime charged." *Id.* (citing *Smith*, 218 Md. App. at 705). Therefore, I suggest this Court affirm COSA's ruling.

[6] I am not suggesting there is an exact amount of factual overlap required; numbers are simply helpful in this case.

Applicant Details

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Journal(s)	**Wisconsin Law Review**
Moot Court Experience	**No**

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Admission(s)	**Wisconsin**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

April 18, 2022

The Honorable John Bates
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Dear Judge Bates:

I presently serve as a lecturer in the common law JD program at Peking University's School of Transnational Law in Shenzhen, and I am writing to express my interest in joining your chambers this summer as a Rules Clerk. In my current position I have primarily been responsible for teaching a course roughly equivalent to a US law school's first-year course on legal research, writing, and analysis, though I have also occasionally taught other electives at the law school, including contract drafting and a seminar on technology, law, and development, as well as a business ethics course at Peking University's HSBC Business School. I anticipate teaching a seminar on academic writing in Q4 of this academic year.

As an academic, I have generally been interested in topics relating to law and development, which I might characterize as the development of legal infrastructure, and technology and the law. I have generally taken a more "law and society" approach to scholarship rather than focusing on doctrinal analysis, which is perhaps unsurprising given that I am a graduate of the University of Wisconsin. For example, in my most recent work with the University of Oxford's China, Law, and Development project, I coauthored a paper looking at possible Chinese influence on the spread of surveillance technology during the COVID-19 pandemic. The focus of the paper is less on doctrinal analysis and more on how data governance frameworks develop under real-world conditions. I therefore see a clerkship position focusing on court rules as an opportunity to further explore my interest in the development of legal infrastructure, especially as COVID-19 seems to have accelerated the adoption of technology and therefore increased the salience of technology-related procedural issues in the US court system.

Additionally, the posting on OSCAR mentions that you would expect a clerk to occasionally assist with your regular district court casework. While I have primarily worked in academic and policy-oriented positions since leaving law school, I am very interested in developing my technical lawyering skills. Accordingly, I would see the opportunity to help with district court cases in addition to working on more academic and policy oriented-topics as a significant benefit.

Per your instructions on OSCAR, I have submitted a resume, transcript, and writing sample along with this cover letter. I have also asked that three letters of recommendation be provided to you through OSCAR. With respect to the writing sample, I have chosen to provide a more policy-oriented work from my time at the World Bank for two reasons. First, most of my work since then has been coauthored as a member of the China, Law, and Development project, and it can be difficult to describe exactly where my contributions end and those of others begin. Secondly, the World Bank memorandum reflects more policy-oriented analysis rather than doctrinal legal analysis. That said, I would of course be happy to provide alternative writing samples if a different type of writing would be more valuable to you.

Thank you for your consideration.

Sincerely,
Jake Skebba

Jacob Skebba
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Academic Appointments

Peking University — Shenzhen, China
Senior C.V. Starr Lecturer of Law, School of Transnational Law — Jul. 2020 – Present
C.V. Starr Lecturer of Law, School of Transnational Law — Nov. 2019 – Jun. 2020

University of Wisconsin — Madison, WI
Teaching Assistant, History Department — Fall 2017, Fall 2018
Research Assistant, Law School — Summer 2017

Other Academic Affiliations

University of Oxford
Research Associate, China, Law and Development Project — Jun. 2019 – Present

Education

University of Wisconsin Law School, J.D., *magna cum laude* — May 2019
- Class Rank: 9th of 150
- Honors: Order of the Coif
  Sonnet Schmidt Edmonds Award (for excellence in the study of energy law)
- Journal: *Wisconsin Law Review*
- Study Abroad: International Summer School in Giessen, Germany (2018)

University of Wisconsin – Madison, B.S. (History) — May 2013

Professional Experience

The World Bank — Washington, D.C.
Legal Consultant — Jan. 2019 – Sep. 2019
- Consulted on draft legislation relating to e-commerce, cybercrime and cybersecurity, data protection, and digital identification and authentication.
- Prepared internal memoranda on the above topics as well as artificial intelligence governance and ethics and open-source software licensing.

United States Navy — San Diego, CA
Judicial Intern — May 2018 – Jul. 2018

Publications & Other Writings

The Digital Silk Road and China's Role in the UN Ad Hoc Cybercrime Committee, China, Law and Development Research Brief No. 14/2020, https://cld.web.ox.ac.uk/files/finalskebbadigital-silk-roadpdf.

The Context and Implications of AIIB Conditionality Practices, China, Law and Development Research Brief No. 8/2019, https://cld.web.ox.ac.uk/files/finalskebbaaiibconditionalitypdf.

Bar Admissions

Wisconsin (July 2019)

Certifications

CIPP/E

Jacob Skebba
University of Wisconsin Law School
Cumulative GPA: 3.68

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Introduction to Substantive Criminal Law	Cecelia Klingele	A-	4	
Contracts 1	Kathryn Hendley	A	4	
Civil Procedure 1	Ion Meyn	A	4	
Legal Research and Writing 1	Andrew Turner	B+	3	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Torts 1	Pilar Ossorio	A-	4	
Civil Procedure 2	Cheryl Weston	B	3	
Legal Research and Writing 2	Kim Peterson	B+	3	
Business Organizations 1	John Ohnesorge	A-	3	
Property	Miriam Seifter	A-	4	

Summer 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law Seminar: 4th, 5th, and 6th Amendments	Cecelia Klingele	A	3	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Energy Law	Miriam Seifter	A-	3	
Federal Law and Indian Tribes	Richard Monette	B	3	
Role of Police in a Free Society	Cecelia Klingele	A	3	
Wisconsin Law Review	Keith Findley	S	2	Satisfactory -- Not a letter-graded course.
Evidence	Stephen Hurley	A	4	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law 1	David Schwartz	A-	3	
Directed Reading: Coding and the Law	Pilar Ossorio	S	3	Satisfactory -- Not a letter-graded course.
Federal Jurisdiction	Robert Yablon	A	3	

Trusts and Estates 1	Howard Erlanger	A	2	
Introduction to Criminal Procedure	Cecelia Klingele	B	3	
Legal Issues: North America and East Asia	Chris Smithka	S	2	Satisfactory -- Not a letter-graded course.
Wisconsin Law Review	Keith Findley	S	2	Satisfactory -- Not a letter-graded course.

Summer 2018 (Study Abroad)

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
International Economic Law and Business Transactions	M. Weiss & A. Andrzejewski	B+	2	
Business Ethics and Human Rights	S. MacLeod & R. DeWinter-Schmitt	A-	2	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law & Modernization Seminar	John Ohnesorge	A-	3	
International Business Transactions	Erik Ibele	A	3	
Professional Responsibilities	Timothy Pierce	A-	3	
Law Review	Keith Findley	S	2	Satisfactory -- Not a letter-graded course.
International Commercial Arbitration	Jason Yackee	S	3	Satisfactory -- Not a letter-graded course.
Government and Legislative Law Clinic	Erin McBride	S	4	Satisfactory -- Not a letter-graded course.

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Government and Legislative Law Clinic	Erin McBride	S	6	Satisfactory -- Not a letter-graded course.

Grading System Description
As excerpted from "Read this First," the University of Wisconsin Law School's handbook:

Law School courses are typically graded on a letter-graded scale from F to A+. Expressed numerically, this is a 4.3 scale (rather than the more-common 4.0 scale) with the relative values of the letters being as follows:

A+ 4.3
A 4.0
A- 3.7
B+ 3.3
B 3.0
B- 2.7
C+ 2.3
C 2.0
C- 1.7
D+ 1.3
D 1.0
D- 0.7

F 0

The Law School's guidelines for faculty to use in assigning grades provides that for all first-year courses, and for advanced classes with an enrollment exceeding 30, the mean grade (i.e., the class average) should fall between 2.85 and 3.1 on the 4.3 scale. For advanced classes with an enrollment of 30 or less, the mean grade should fall between 2.7 and 3.3 on the 4.3 scale.